[ORAL ARGUMENT NOT YET SCHEDULED]
Nos. 15-1074, 15-1130

In the United States Court of Appeals
for the District of Columbia Circuit

AMPERSAND PUBLISHING, LLC, D/B/A SANTA BARBARA NEWS-PRESS,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

GRAPHICS COMMUNICATIONS CONFERENCE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Intervenor for Respondent/Cross-Petitioner.

On Petition for Review of an Order
of the National Labor Relations Board

PETITIONER'S OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, RELATED CASES, AND CORPORATE DISCLOSURE STATEMENT

I. PARTIES, INTERVENORS, AND AMICI

Based on the knowledge and information reasonably available to Petitioner, the following are all parties, intervenors, and amici that have appeared in this case, either before this Court or before the National Labor Relations Board ("the Board"):

a) Ampersand Publishing, LLC, d/b/a the Santa-Barbara News-Press ("the News-Press") was the Respondent before the Board and is the Petitioner/Cross-Respondent in the current proceeding;

b) General Counsel of the Board was a party before the Board, and the Board is the Respondent/Cross-Petitioner in the current proceeding;

c) Graphics Communications Conference of the International Brotherhood of Teamsters was the Charging Party before the Board, and is the Intervenor in the current proceeding.

II. RULINGS UNDER REVIEW

The ruling under review is *Ampersand Publishing, LLC*, 362 N.L.R.B. No. 26 (Mar. 17, 2015), a decision and order of the National Labor Relations Board that affirmed *Ampersand Publishing, LLC*, 358 N.L.R.B. No. 141 (Sept. 27, 2012), a decision and order that largely affirmed *Ampersand Publishing, LLC*, No. 31-

CA-28589, 2010 WL 3285398 (N.L.R.B. Div. of Js. May 28, 2010), a decision and order of Administrative Law Judge Clifford H. Anderson.

III. RELATED CASES

Pursuant to Circuit Rule 28(a)(1)(C), the News-Press submits that a petition for review was previously filed in the present case, but that petition was dismissed without briefing or argument after a successful challenge to the appointment of two persons on the Board as constitutionally infirm. *Ampersand Publ'g, LLC v. NLRB*, Case No. 12-1450. Otherwise, the present case has not previously been on review before this Court, any other federal court of appeals, or any court in the District of Columbia.

The News-Press also submits that *Ampersand Publishing, LLC v. NLRB*, Consolidated Case Nos. 15-1082 and 15-1154, which is currently pending before this Court, is related to this case because it involves the same parties and similar issues. In fact, Case No. 15-1082 emerged from a subpoena dispute that arose out of the charges at issue in the present appeal.

Finally, the News-Press represents that this Court's December 18, 2012 decision in *Ampersand Publishing, LLC v. NLRB*, Consolidated Case Nos. 11-1284 and 11-1348, is related to this case. This case should be heard by the same panel that resolved

Case Nos. 11-1284 and 11-1348, for the parties are identical and the cases share common core issues. Indeed, the charges at issue here are part of an ongoing pattern of harassment by the Union, under the authority of the Board, that began during the events of Case Nos. 11-1284 and 11-1348 and continue to this day. Further, in deciding the underlying dispute, the Board relied, in part, on *Ampersand Publ'g, LLC*, 357 N.L.R.B. No. 51 (2011), which was vacated by this Court's 2012 decision. And the Court's 2012 analysis in *Ampersand Publishing* directly controls the present case.

IV. CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner Ampersand Publishing, LLC, d/b/a Santa Barbara News-Press, states that it is a privately held California limited liability corporation. It has no parent corporation, nor does any publicly held corporation own 10 percent or more of its stock.

Date: May 16, 2016

MICHEL & ASSOCIATES, P.C.

/s/C. D. Michel
Counsel for Petitioner/
Cross-Respondent

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GLOSSARY OF ABBREVIATIONS & ACRONYMS

Term	Abbreviation
Administrative Law Judge	ALJ
Administrative Procedure Act	APA
Ampersand Publ'g, LLC, 358 N.L.R.B. No. 141 (Sept. 27, 2012) (the Board Decision)	Bd. Dec.
General Counsel's Exhibit	G.C. Ex.
Graphics Communications Conference International Brotherhood of Teamsters	the Union
National Labor Relations Act	NLRA or the Act
National Labor Relations Board	the Board
Ampersand Publishing, LLC, d/b/a Santa Barbara News-Press	the News-Press
Respondent's Exhibit	R. Ex.
Transcript of 2009 NLRB Hearing Before ALJ Clifford Anderson	Tr.
Unfair Labor Practices	ULPs

JURISDICTIONAL STATEMENT

This case is before the Court on a petition for review brought by Ampersand Publishing, LLC, d/b/a Santa Barbara News-Press ("the News-Press") and a cross-application of the National Labor Relations Board ("the Board") to enforce a final order of the Board against the News-Press. In its decision, the Board held that the newspaper had engaged in conduct violative of section 8(a)(1), (3), and (5) of the National Labor Relations Act ("NLRA" or "the Act").

The Board had subject-matter jurisdiction pursuant to 29 U.S.C. § 160, which empowers the Board "to prevent any person from engaging in any unfair labor practice [ULP] … affecting commerce," *id.* 160(a), and to issue complaints, conduct hearings, and issue orders regarding alleged ULPs, *id.* at § 160(b)-(c). This Court has jurisdiction over this matter pursuant to section 160(e)-(f), which authorizes any party aggrieved by a final order of the Board to seek review in the D.C. Circuit and allows the Board to cross-apply for enforcement.

The Board issued its order, final with respect to all parties, on March 17, 2015. The News-Press filed a petition for review on March 30, 2015, and the Board filed a cross-application for enforcement on May 12, 2015. Both filings were timely because

they were made within a reasonable time, and the Act places no deadline on the initiation of proceedings to review Board orders.

STATEMENT OF ISSUES

1. A newspaper publisher holds the First Amendment right to direct the content of its paper. Union attempts to seize that control are unprotected, and an employer's actions to protect its rights against such attacks are both lawful and inextricably linked to its response to attendant wage-and-hour demands. Here, the News-Press' employees organized to further a single, primary goal—to seize editorial control. Did the Board err in finding the News-Press' protective actions violated the NLRA?

2. A newspaper publisher's decisions regarding who it desires to write the news necessarily impact its ability to direct the content of its paper. As such, government intrusion into those decisions directly threatens the First Amendment rights of a newspaper employer. Does the Board's order demanding that the News-Press bargain over such decisions with a union whose primary purpose was to seize editorial control violate the First Amendment?

3. Are the Board's conclusions regarding various alleged ULPs and the remedies imposed based on a proper application of the law and supported by a preponderance of the evidence?

STATEMENT REGARDING ADDENDUM

An addendum reproducing relevant constitutional and statutory provisions is bound with this brief.

STATEMENT OF THE CASE

"To an unusual degree the instant matter is best understood in the context of a series of events covering a period of years before as well as during the events in controversy. A relatively long recitation of background events is therefore useful." *Ampersand Publ'g, LLC*, 358 N.L.R.B. No. 141, 10 (Sept. 27, 2012) ("Bd. Dec.").

I. MANAGEMENT OF THE NEWS-PRESS AND GROWING CONCERNS REGARDING BIASED REPORTING

The News-Press is a daily newspaper published in Santa Barbara, California. The paper's current owner, Wendy McCaw, purchased the paper in 2000 through her privately held company, Ampersand Publishing, LLC. By 2004, McCaw had become increasingly alarmed by bias in the paper's reporting. *Ampersand Publ'g, LLC v. NLRB*, 702 F.3d 51, 53 (D.C. Cir. 2012). Instances of biased reporting continued through 2005 and well into 2006. Tr. 2261-66; R. Exs. 983, 1001, 1005. In a 2005 survey of News-Press readers, 64% expressed grave concerns about the paper's credibility and biased reporting. Tr. 2274-75; R. Ex. 984.

To address McCaw's concerns, the News-Press issued warning letters and conducted staff training sessions. *McDermott v.*

Ampersand Publ'g, LLC (*McDermott II*), 593 F.3d 950, 954 (9th Cir. 2010). These efforts proved to be unpopular among the editors, reporters, and other newsroom employees, who saw the efforts to eliminate biased reporting as a threat to a purported separation between the business of the newspaper and its reporting. *Id.*

II. EMPLOYEE RESIGNATIONS, EARLY EFFORTS TO UNIONIZE, AND DEMANDS FOR EDITORIAL CONTROL

Prompted by McCaw's attempts to address bias in her paper, then-editor-in-chief Jerry Roberts resigned during the first week of July 2006. Bd. Dec. 19. The defecting editor met with his allies in the newsroom to discuss forming a union to achieve the autonomy to publish articles conveying their views, rather than those of the paper. *Ampersand*, 702 F.3d at 53.

On July 5 and 6, 2006, after a series of clashes with McCaw, six employees resigned in protest over what they perceived to be "unethical interference" in the "news-reporting function" of the newspaper. *Ampersand Publ'g, LLC*, 357 N.L.R.B. No. 51, 29 (Aug. 11, 2011). Approximately 30 employees subsequently met with Union representatives, after which they drafted a demand letter outlining their four goals, the *first* being to "[r]estore journalism ethics" to the paper—to "implement and maintain a clear separation between the opinion/business side of the paper and the news-

gathering side." *Ampersand*, 702 F.3d at 53-54. Their *second* demand was job reinstatement for the six editors who had resigned. *Id.* at 54; R. Ex. 998.[1]

Later that month, the employees held a series of rallies, the theme of which was restoring "the wall between opinion and the news." *Ampersand*, 702 F.3d at 54. They also launched a campaign to persuade readers to cancel their subscriptions "if the [Union's] demands were not met." *Id.* Thousands of pledge cards were distributed to readers that expressed the signatory's support for the "newsroom staff in its effort to restore *journalistic integrity* to the paper." *Id.* In connection with the cancellation campaign, the Union, along with several newsroom employees, established savethenewspress.com, providing information about the organizing effort and soliciting community support. ALJ Report and Recommendation to Overrule Employer's Objections and Certify Petitioner, *Ampersand Publ'g, LLC*, Case No. 31-8602 (Mar. 8, 2007). The website included a message "from the newsroom staff," inviting its readers to join the organized staff in their effort "to restore journalistic integrity to the paper and negotiate a fair

[1] *Third*, the employees sought to negotiate a contract governing wages and hours; and, *fourth*, they demanded that the News-Press recognize the Union as their bargaining representative. R. Ex. 998.

working contract." *Id.*

On July 29, 2006, Union organizer Marty Keegan appeared on a local radio show, admitting that the issues at the News-Press were not about wages, hours, or terms of employment, but about controlling the content of the paper:

> [M]aybe that's what separates our country from a lot of countries where state-owned papers or papers run by powerful interest[s] … turn it into, literally, just a simply propaganda sheet, and, and people in those countries never receive news of, of any varying opinion, it's simply the voice of whoever happens to have control. ***And that's what we're fighting against here.***

R. Ex. 1105 at 14 (emphasis added). Union attorney, Ira Gottlieb, who also appeared, echoed Keegan's sentiments:

> [W]hat's going on [at the News-Press] is the wall between … the editorial page, and run by the ownership, and the other writing in the paper, which is supposed to be news, is supposed to be objective, … and that wall is coming down. ***And that's what led to the editors exiting***.

Id. at 4 (emphasis added).

For the Union and its supporters, the dispute was never about wages, hours, and working conditions. It was about controlling the content of the paper—who would control it and, more importantly, who would not. Keegan's radio comments bear that out:

> The fact is that labor unions understand that the voice in those communities are the newspapers. And if we can't get *stories about situations that arise in the paper*,

> in the communities, into those newspapers, or we can't tell an opposite side of a story or for that matter present an opposition, a, a position, this is where the death or the, or the possible death of democracy starts.
>
> ****
>
> Santa Barbara, to me, is, is definitely the precedent that's going to set a tone for the rest of the country. *This fight's huge, and we've got to continue.*

Id. at 11-12 (emphasis added). Keegan was clear: This "huge" fight was never about activities protected by the Act. It was about an overt, systemac hijacking of this particular publisher's First Amendment rights, to be followed by a national campaign to repeat the same power grab across the national media landscape. In short, the Union sought to procure control of all the nation's media, and it would do so under the authority of the federal government, through the Board. Considering the weakened state of the industry, few (if any) media employers would have the resources necessary to defend against this onslaught. Our precious rights of free expression would be sacrificed "by a thousand cuts" or, in this case, ULPs.

III. ELECTION OF THE UNION AND UNPROTECTED ORGANIZING ACTIVITIES

On August 10, 2006, the Union filed a petition with the Board seeking to represent a unit of newsroom employees. *McDermott II*, 593 F.3d at 955. The Board Regional Director conducted a secret ballot election on September 27, 2006, and the Union was elected as the employees' collective-bargaining representative in a 33-6 vote. *Id.* The

Board certified the Union over the News-Press' objection. *Id.*

Immediately upon its election, the Union engaged in a series of unprotected activities aimed at diminishing the News-Press' readership. On February 2, 2007, for example, several employees hung two large banners from a footbridge over Highway 101 near Santa Barbara, CA, urging drivers to "Cancel Your Newspaper Today." *Ampersand*, 702 F.3d at 54. They also displayed smaller signs urging drivers to "Protect Free Speech." *Id.* Following the Highway 101 incident, the News-Press discharged nine Union-supporting employees for issues related to biased reporting and for participating in the event. *Id.* The News-Press also cancelled another Union supporter's column, and four employees received lower performance evaluation scores than previously received. *Id.*

IV. REJECTION OF THE FIRST CONSOLIDATED COMPLAINT AGAINST THE NEWS-PRESS BY THREE FEDERAL COURTS

The Union filed a flurry of complaints against the News-Press between August 2006 and February 2007. *McDermott II*, 593 F.3d at 955. On May 31, 2007, the Board issued a First Consolidated Complaint against the News-Press. *Id.* That complaint alleged the News-Press was in violation of section 8(a)(2) of the NLRA by threatening employees with discipline if they engaged in an "employee delegation" by interrogating employees about the union,

instructing employees to remove buttons and signs, and interfering with union activities. *Ampersand*, 357 N.L.R.B. No. 51, 18. It also alleged that the paper had violated section 8(a)(1) and (a)(3) by discharging employees, canceling an employee's column, using two-day suspension notices, issuing lower performance evaluations, and failing to award bonuses. *Id.* ALJ William Kocol ruled that the News-Press had engaged in various ULPs alleged in the First Consolidated Complaint. *Id.* at 2.

After the ALJ decision, but before the Board affirmed the order, the Board sought a section 10(j) injunction to enforce its order and to reinstate the discharged employees. *McDermott v. Ampersand Publ'g, LLC* (*McDermott I*), No. 08-1551, 2008 WL 8628728, at *5 (C.D. Cal. May 22, 2008). The District Court for the Central District of California denied the request because the relief "pose[d] a significant risk of violating the [News-Press's] First Amendment rights." *Id.* at *5. He explained that "the Union-related activity had as a central demand the ceding of an aspect of [the newspaper's] editorial discretion." *Id.* at *8.

The Ninth Circuit affirmed, holding that the district court's findings were supported by the record and, ultimately, that relief would burden the News-Press's exercise of editorial discretion. *McDermott II*, 593 F.3d at 961. The court reasoned:

> [T]he employee-initiated union campaign aspired in large part to compel the publisher of the News–Press to relinquish to the newsroom staff editorial control over the reporting of the news, which lies at the core of a newspaper's First Amendment rights.
>
> Under these circumstances, as the district court aptly observed, it "does not seem possible to parse … [the newspaper's] animus toward the Union generally from its desire to protect its editorial discretion. The motives necessarily overlapped in this case."

Id. (emphasis added) (citing *McDermott I*, 2008 WL 8628728, at *12).

Notwithstanding the Ninth Circuit's clear decision, the Board affirmed ALJ Kocol's order on August 11, 2011. *Ampersand*, 357 N.L.R.B. No. 51, 1. The News-Press petitioned the D.C. Circuit for review, and the Board filed a cross-application for its enforcement. *Ampersand*, 702 F.3d at 53.

On December 18, 2012, this Court found that the Union was primarily organized to further the improper purpose of removing editorial control from the News-Press' publisher. *Id.* at 58-59. "[A]utonomy was the focus of the campaign. The record is replete with discussion of journalistic ethics and who rightfully controlled the content of the News-Press. Wages, benefits, and working conditions … drew scant reference." *Id.* This Court thus found that the Board's order posed a serious risk to the News-Press' First Amendment rights; it vacated the Board's decision and denied the cross-application for enforcement. *Id.* at 53.

V. THE PRESENT CASE—THE SECOND CONSOLIDATED COMPLAINT

The present matter arises from 15 complaints filed against the News-Press between November 27, 2007, and March 10, 2009, and consolidated into a Second Consolidated Complaint. Bd. Dec. 8-9.[2] Specifically, the complaint alleged the following NLRA violations:

1. That the News-Press interfered with, restrained, and coerced employees in the exercise of their guaranteed rights in violation of section 8(a)(1) of the NLRA by: (1) issuing a letter to employees offering to provide the News-Press' counsel to represent employees during the Board's on-going investigation; and (2) instructing employees not to discuss the terms and conditions of their employment during a staff meeting held on December 3, 2008. *Id.* at 8-9.

2. That the News-Press violated section 8(a)(3) and (1), discouraging membership in a labor organization or discriminating against employees for union activity, by:

- Modifying its performance evaluation system;
- Laying off unit employee Richard Mineards;
- Suspending and discharging unit employee Dennis Moran;

[2] The relevant facts surrounding each charge on appeal are discussed briefly in the analysis of each issue in the Argument section below.

- Changing employment terms and conditions of unit employees hired through temporary agencies or, alternatively, transferring unit work to non-unit employees;
- Transferring unit work to non-unit worker Robert Eringer;
- Failing to grant merit wage increases; and
- Failing to conduct performance evaluations for its unit employees for 2008 in accordance with past practice.

Id. at 9.

3. That the News-Press violated section 8(a)(5) and (1), failing to bargain collectively and in good faith, by:

- Laying off unit employees Richard Mineards, Kyle Jahner, and DeWitt Smith without notice and an opportunity to bargain;
- Suspending and discharging unit employee Dennis Moran without notice and an opportunity to bargain;
- Failing to timely furnish information requested by the Union;
- Modifying the terms and conditions of employment of unit employees hired through temporary agencies or, alternatively, transferring unit work to non-unit employees without notice and an opportunity to bargain;

- Transferring unit work to non-unit employee Robert Eringer without notice and an opportunity to bargain;
- Withholding merit wage increases without notice and an opportunity to bargain;
- Unilaterally modifying its performance evaluation system;
- Failing to conduct performance evaluations for its unit employees for 2008 in accordance with past practice;
- Establishing a "one-story-per-day requirement" without notice and an opportunity to bargain;
- Dealing directly with unit employees by offering Richard Mineards non-unit work after his lay-off; and
- Bargaining in bad faith with the Union.

Id. at 9-10, 37. The News-Press refuted each charge.

VI. THE BOARD DECISION ON APPEAL

ALJ Clifford Anderson presided over a 21-day trial in 2009. *Id.* at 8. On May 28, 2010, he found in favor of the Union on nearly every charge,[3] rejecting the contention that the Union's

[3] The ALJ found no violation for News-Press modifying its evaluation system, failing to conduct performance evaluations according to past practice, or laying off Jahner and Smith. Bd. Dec. 27, 59-60. The ALJ sustained the 8(a)(5) charges for Mineards' lay-off and for failing to grant wage increases, but he rejected the 8(a)(3) charges for the same conduct, *id.* at 39-40. Finally, he rejected the theory that the News-Press' temporary employees were "unit employees." *Id.* at 17.

unconstitutional demand for editorial control was a defense to claims of "bad-faith bargaining" and ULPs. *Id.* at 21-22. In doing so, he ignored the federal courts' rulings on point, never once acknowledging that those decisions dealt with vital First Amendment rights all government agencies are bound to respect. *See id.* at 21-22, 28-29. What's more, he inexplicably held that the News-Press had failed to bargain in good faith and engaged in ULPs from 2007 to 2009—the same period for which this Court has found the Board's analysis of the News-Press' bargaining obligations to be "tainted" by the Union's improper quest to gain editorial control of the paper. *Id.* at 88-89.

On September 27, 2012, the Board affirmed ALJ Anderson's findings. *Id.* at 1. The Board's decision made *no* mention of the News-Press' First Amendment right to freedom of the press or of the federal court decisions holding that the Union had organized for an improper purpose. *See id.* at 1-6. The News-Press filed a motion for reconsideration, but the Board denied relief. *Ampersand Publ'g, LLC*, 359 N.L.R.B. No. 127, 1 (May 31, 2014).

The News-Press filed a petition for review with the D.C. Circuit, but the case was held in abeyance pending a challenge to the appointment of two persons on the Board as constitutionally infirm. *Ampersand Publ'g, LLC*, 362 N.L.R.B. No. 26, 1 (Mar. 17,

2015). On June 26, 2014, the Supreme Court issued a decision holding that the challenged appointments—and their decisions—were invalid. *Id.* (citing *NLRB v. Noel Canning*, -- U.S. --, 134 S. Ct. 2550 (2014)). The Board thus set aside its September 27 decision. *Id.* On March 17, 2015, the Board again affirmed Anderson's September 27 order. *Id.* The News-Press filed a timely Petition for Review, and the Board filed a cross-application for enforcement of its order.

VII. CONTINUED HARASSMENT OF THE NEWS-PRESS

On May 3, 2011, after the Ninth Circuit confirmed that "editorial control" is an improper organizing purpose, News-Press employees filed a petition seeking decertification of the Union.[4] Even though the Union no longer had the support of the newsroom, and those employees who had voted for unionization had long ago left, the Regional Director for Region 31 blocked the request and dismissed the petition, citing the existence of pending ULPs.[5] The

[4] Employer's Request for Review of the Regional Director's Order at Ex. 2, *Ampersand Publ'g, LLC*, Case No. 31-RD-001622 (N.L.R.B. June 28, 2013), *available at* http://apps.nlrb.gov/link/document.aspx/09031d458048e91a.

[5] Region 31 Order Dismissing Petition, *Ampersand Publ'g, LLC*, Case No. 31-RD-001622 (N.L.R.B. June 14, 2013), *available at* http://apps.nlrb.gov/link/document.aspx/09031d45812d6bf7.

Board affirmed on June 9, 2015.[6] Prevented by the Board to decertify, the newsroom employees have, since 2011, been forced to accept representation from an outside party that they neither chose nor support.

On May 21, 2013, the Union filed another charge against the News-Press, alleging the paper had purported to withdraw recognition and ceased bargaining. NLRB Case No. 31-CA-10564. Thereafter, the Board issued a third complaint alleging seven new charges for ULPs occurring between 2009 and 2013. The News-Press sought dismissal on First Amendment grounds, but the Board summarily rejected the request.[7] The third complaint is pending, and the Union and the Board remain poised to file further charges against the News-Press.

SUMMARY OF ARGUMENT

Since 2006, the News-Press has been the target of a well-organized effort by its newsroom employees and their Union to wrest editorial control of the newspaper from its owner and publisher. Their unconstitutional aim was legitimized by the Board,

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[6] *Ampersand Publ'g, LLC*, No. 31-00162, 2015 WL 3562724, at *1 (N.L.R.B. June 9, 2015).

[7] NLRB Order Denying Motion to Dismiss, *Ampersand Publ'g, LLC*, Case Nos. 31-CA-029759, et al. (N.L.R.B. Apr. 17, 2014), *available at* http://apps.nlrb.gov/link/document.aspx/09031d45816adc71.

which has repeatedly found in favor of the employees and against the News-Press in concluding that the paper had committed ULPs in its dealings with news staff.

In December 2012, this Court rejected the Board's application to enforce an order finding that the News-Press had violated labor laws and demanding that the employer reinstate discharged employees. The Court determined that the organizing efforts that spawned the allegedly illegal labor action were aimed at obtaining editorial control and held that the Board's "analysis was *tainted* by its mistaken belief that employees had a statutorily protected right to engage in collective action aimed at limiting Ampersand's editorial control over the News-Press." *Ampersand*, 702 F.3d at 59 (emphasis added).

The charges at issue in the present appeal are inextricably related to those charges already reversed by this Court. For they stem from the News-Press' justified reluctance to bargain with the Union based on its First Amendment right to direct the content of its newspaper. And they relate directly to facts relied on by this Court in vacating the Board's order on First Amendment grounds in 2012. In other words, the present charges are merely part of a continued pattern of harassment by former News-Press employees, the Union, and the Board to interfere with the News-Press's

editorial control—behavior this Court has concluded is contrary to the constitutional rights of the News-Press.

The Board has demonstrated its continued willingness to pursue the News-Press through ULP charges even though three federal courts have confirmed that such enforcement actions threaten the News-Press' First Amendment rights. The Court is encouraged to follow its previous decision in *Ampersand Publishing*, and find that government endorsement of former employees' demands for content control violates the First Amendment, and to hold that the employees' improper organizing purpose so tainted their wage-and-hour demands that the Board's decision and order must be vacated.

Alternatively, and with regard to the individual allegations of unfair labor practices, the News-Press contends: (1) that the First Amendment prevents the Board from exploiting the NLRA to dictate what the publisher chooses to print by demanding the News-Press bargain with the Union over its staffing decisions; and (2) that the remaining charges are not supported in fact or in law.

For these reasons, the Court should vacate the Board's decision below and deny the Board's application for enforcement.

STANDING

The News-Press has standing to bring this Petition for Review. The News-Press is an employer charged by the Board with violations of the NLRA for unfair labor practices and "bad faith" bargaining in its dealings with its employees. On March 17, 2015, the Board issued a final order rejecting the News-Press' defenses and issuing various orders averse to the News-Press' interests.

On that basis, the News-Press is a party actually "aggrieved by a final order of the Board granting or denying in whole or in part the relief sought" within the meaning of 29 U.S.C. § 160(f). It thus has standing to seek review of that decision. *Liquor Salesmen's Union v. NLRB*, 664 F.2d 1200, 1206 n.8 (D.C. Cir. 1981) (standing to appeal an order of the Board requires an "adverse effect in fact").

ARGUMENT

I. STANDARD OF REVIEW

In reviewing an agency decision, this Court has a statutory obligation to decide all "relevant questions of law" and "interpret constitutional provisions." 5 U.S.C. § 706. "[It] shall … hold unlawful and set aside agency action, findings, and conclusions found to be … contrary to constitutional right, power, privilege, or immunity." *Id.* § 706(2)(B). When reviewing an agency decision, the "court owes no deference to the agency's pronouncement on a

constitutional question." *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1044 (D.C. Cir. 2009). Because this case turns on important questions regarding the fundamental rights protected by the First Amendment, review is de novo. *Id.*

Alternatively, with respect to specific alleged violations of the NLRA, the Court must reverse the Board's decision if it "rests upon a finding not supported by 'substantial evidence' or [if] the Board failed to apply the proper legal standard or departed from precedent without giving a reasoned justification therefor." *Jackson Hosp. Corp. v. NLRB*, 647 F.3d 1137, 1141 (D.C. Cir. 2011) (quoting *S&F Mkt. St. Healthcare, LLC v. NLRB*, 570 F.3d 354, 358 (D.C. Cir. 2009) (quoting 29 U.S.C. § 160(f))). While deference is generally owed to the Board's findings, the Court must consider "whether on this record it would have been possible for a *reasonable* jury to reach the Board's conclusion." *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1093 (D.C. Cir. 2002) (emphasis added).

II. THE FIRST AMENDMENT SHIELDS THE NEWS-PRESS FROM LIABILITY FOR ULPS CHARGED BY A UNION FORMED PRIMARILY FOR THE IMPROPER PURPOSE OF SEIZING EDITORIAL CONTROL

For years, tensions have seethed between News-Press management and Union-represented newsroom employees. At the heart of that conflict are the Union's demands that the owner and publisher of the News-Press surrender her First Amendment right

"to exercise control over the news pages of the News-Press." *McDermott II*, 593 F.3d at 962; *Ampersand*, 702 F.3d at 58. From the very beginning of the organizing efforts, the employees' oft-stated and overwhelming purpose for organizing into a bargaining unit was to curtail the publisher's right to publish the news as she sees fit. *See supra*, Statement of the Case, Parts II-III.

That purpose is patently unlawful—a fact of which the Board is certainly aware. A district court and two circuits, including this one, have explicitly ruled that the organizing efforts at the center of this very dispute were illegitimate and that the Board's intervention in furtherance of that improper goal significantly risked violating the First Amendment rights of the News-Press. *Ampersand*, 702 F.3d at 58-59; *McDermott II*, 593 F.3d at 966, *McDermott I*, 2008 WL 8628728, at *5. As the Ninth Circuit explained in *McDermott II* in 2010:

> Deploying the NLRA to protect the employees' efforts in support of the Union would risk "circumscrib[ing] the full freedom and liberty of [the News-Press] to publish the news as it desires it published [and] to enforce policies of its own choosing with respect to the editing and rewriting of news for publication."

593 F.3d at 961 (quoting *Assoc. Press v. NLRB*, 301 U.S. 103, 133 (1937)).

When the Board continued to use its investigatory authority to

further the Union's editorial control aims, concerns about the Board coercing the News-Press into surrendering its First Amendment rights were echoed by this Court in *Ampersand* two years later. 702 F.3d at 56-57. There, the Court recognized that while the Board generally enjoys broad investigatory and enforcement discretion, it is well-established that its power must yield to the constitutional rights of those the Board seeks to exercise it against. *Id.* at 56

> Newspapers, like other employers, are subject to the [NLRA]. Nonetheless, "otherwise valid laws may become invalidated in their application when they invade constitutional guarantees, including the First Amendment's guarantee of a free press." Where enforcement of the Act would interfere with a newspaper publisher's "absolute discretion to determine the contents of [its] newspaper[]," the statute must yield.

Id. (citations omitted). In short, when the First Amendment rights of the employer are threatened, as here, courts should refrain from authorizing the Board's use of its full authority. "[T]he First Amendment wholly favors protection of the employer's interest in editorial control, *the main issue in dispute*; it is hard to imagine that employees can prevail over that simply by adding 'a few verses' of wage demands." *Id.* at 58 (emphasis added). To the extent "journalistic integrity," as conceived by the Board and the Union, requires a publisher to cede editorial control, the First Amendment "precludes government coercion in its name." *Id.* At 57.

Like the actions taken by the Board in *Ampersand*, the continued investigatory and enforcement actions taken by the Board against the News-Press here are similarly unconstitutional, for they are part of an ongoing effort to serve the improper purpose of the Union under the pretext of common wage-and-hour complaints. Through regular investigations into the (illicit) Union's complaints of ULPs, the Board is acting as an instrument of retaliation against the News-Press for its refusal to meet the Union's primary demand that management relinquish editorial control to newsroom employees.

Enforcement of the ULPs making up the Second Consolidated Complaint may not facially "require the paper to change its editorial policy," *see McDermott II*, 593 F.3d at 962 (quoting *McDermott II*, 593 F.3d at 968 (Hawkins, J., dissenting)), and may be argued to be a less-direct infringement on the First Amendment, obviating the concerns raised in *McDermott I*, *McDermott II*, and *Ampersand*. But the Board's continued investigation of complaints *claimed* to be unrelated to the editorial control of the paper flow *directly* from, and act in furtherance of, the Union's primary goal—to curtail the First Amendment rights of the publisher. And it continues the long history of the Union, together with the Board, to employ coercive tactics against the News-Press "to force the News-Press to give in to

[the employees'] union-backed demand for the relinquishment of editorial control...." *Id.* at 960; *see Ampersand*, 702 F.3d at 56-57 (finding the Board order "clear[ly] coercive" because it sanctioned the News-Press for disciplining employees who sought to damage the newspaper because the News-Press refused to cede to demands for editorial control). Focusing only on direct orders that the paper change its editorial policies "closes [our] eyes to what the underlying labor dispute here is about: the ability of the newspaper owner and publisher to exercise control over the news pages of the News–Press." *McDermott II*, 593 F.3d at 962 (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (White, J. concurring)).

What's more, the Board decision seeks to remedy alleged wrongs under the NLRA occurring during the same period as those dismissed by this Court in 2012—if the ULPs at issue here had been brought together with those in *Ampersand*, they too would have been summarily dismissed by this Court because of their inseparable relation to the First Amendment problem at the *very core* of this dispute. *See Ampersand*, 702 F.3d at 55, 59 (finding it impossible to parse the First Amendment and wage-and-hour issues here, the Court "vacate[d] the Board's order and den[ied] the cross-application for enforcement *without addressing the parties' arguments regarding the details of individual violations the Board*

found....") (emphasis added).

ALJ Anderson acknowledged the Central District of California and Ninth Circuit decisions twice denying the Board's request for section 10(j) relief, but he refused to follow the courts' guidance. Bd. Dec. 11. Referring to those decisions, he simply stated:

> [W]hile each contains scholarship and analysis bearing on the instant case and has been considered for that content and learning, Federal court proceedings under Section 10(j) of the Act are to a degree conceptually independent of the application of those portions of the Act concerning unfair labor practice proceedings.... And, the Federal decisions address the Kocol decision not the instant proceeding.

Id. This was the ALJ's way of indicating that he was free to ignore the federal court decisions as they related to the News-Press' First Amendment rights and would, instead, focus on the rights of the employees and the Board's pursuit of allegedly unrelated ULPs.

But those ULPs *cannot* be divorced from the violation of the News-Press' rights because each relates to, and is tainted, by the improper formation of the Union for the purpose of seizing editorial control. *See Ampersand*, 702 F.3d at 59. The Board cannot escape the untreatable stain of the employees' improper demand for content control and their pre-certification activities—facts that call into question the very legitimacy of the Union's representation of the employees. Like this Court ruled in 2012, the Union and the

Board cannot simply add "'a few verses' of wage demands" and overcome its First Amendment problem—a problem that made the News-Press reflexively protective of its rights in its dealings with the Union. *Id.* at 58; *see also id.* ("[W]e do not think that employees can extend [section] 7's protections by wrapping an unprotected goal in a protected one, by tossing a wage claim in with their quest for editorial control.").

Problematically, the Board's decision *repeatedly* references the "bad" intentions of the News-Press, embracing a caricature of the petitioner as an evil employer, bent on breaking Union support, intimidating its employees, and destroying the economic power of the bargaining unit. Bd. Dec. 3, 88, 90. It regularly does so in justifying its findings that the News-Press has violated section 8(a)(3) by unlawfully discriminating against employees for union activity. *Id.* at 9, 39. But the Court's 2012 decision readily dispenses with the Board's repeated assumption that the News-Press was motivated by anti-union animus:

> [T]his analysis "rests on a false dichotomy. The Union was organized, in part, to affect [the News-Press'] editorial discretion and undertook continual action to do so. It therefore does not seem possible to parse … [the News-Press'] animus toward the Union generally from its desire to protect its editorial discretion. *The motives necessarily overlapped in this case*."

Ampersand, 702 F.3d at 58-59 (emphasis added) (quoting

McDermott I, 2008 WL 862728, at *12, quoted in *McDermott II*, 593 F.3d at 961). The News-Press' subjective feelings toward the Union simply cannot be relied on as evidence of a violation of the NLRA here. To do so improperly encroaches on the First Amendment rights of the News-Press, for as this Court has recognized there is simply no way to "disentangle [the News-Press'] attitude toward the union from its desire to protect editorial discretion." *Id.* at 59. (internal quotations omitted).

ALJ Anderson and the Board were *bound* to follow the legal precedents of the reviewing federal courts—an obligation the Board is all-too-often happy to ignore. *See Douglas Foods Corp. v. NLRB*, 251 F.3d 1056, 1067 (D.C. Cir. 2001) (lamenting that "[t]ime and again this Court has been required to overturn NLRB orders that violate the explicit requirements of our precedent"). The Board's failure to respect that obligation so tainted its entire analysis that the agency's decision must be overturned.

Ultimately, the Board's Decision and Order directly conflicts with the federal courts' decisions in *McDermott I*, *McDermott II*, and *Ampersand*, and with the thrice-held determination that the employees' demands were an improper attempt to strip the publisher of her First Amendment right to editorial control. Unless the Board can provide new or different facts as to the employees'

demands and underlying purpose for unionization, the taint of the employees' attempt to wrest control of content of the newsroom stories carries over into the consolidated complaint here. It has not and it cannot. The Board's decision was in error.

III. THE FIRST AMENDMENT PREVENTS THE BOARD FROM EMPLOYING THE NLRA TO DICTATE WHAT THE NEWS-PRESS PRINTS THROUGH DIRECTING ITS REPORTER STAFFING DECISIONS

For some time after the organization effort, the News-Press made decisions to continue its long-standing practice of hiring freelance writers and employees from staffing agencies to work for a specified period or to complete particular projects. Bd. Dec. 28, 62; G.C. Ex. 234; Tr. 473, 554. It also terminated two employees, Dennis Moran and Richard Mineards. Bd. Dec. 9-10. These employment decisions prompted the Union to file ULP charges that the paper failed to bargain over the termination of its members and the transfer of unit work to non-unit workers in violation of section 8(a)(1) and (5) . The Union also charged that the News-Press took those actions out of anti-union animus in violation of section 8(a)(3) . The Board dismissed the charge that Mineards was laid-off in violation of section 8(a)(3), but sustained the others. Bd. Dec. 32, 39-40, 42-44, 74-76. The News-Press' staffing decisions, however, are protected by the First Amendment, and all charges should have been dismissed.

It is well-established that newspaper publishers have the absolute authority to determine the contents of their papers. *Ampersand*, 702 F.3d at 56 (citing *Tornillo*, 418 U.S. at 258, and *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1557-58 (D.C. Cir. 1984)). Since decisions regarding what is printed, the treatment of public issues, and a paper's size and content limitations constitute the exercise of editorial judgment protected by the Constitution, "government regulation of and interference with such editorial choice is presumptively problematic." Harry G. Hutchison, *Ampersand, Tornillo, and Citizens United: The First Amendment, Corporate Speech, and the NLRB*, 8 N.Y.U. J. L. & Liberty 630, 647 (2014) (citing *Miami Herald*, 418 U.S. at 248).

As such, the forced re-hire of a news reporter employee terminated for reasons related to content is constitutionally impermissible due to its potentially chilling effect on the publisher's speech. *Ampersand*, 702 F.3d at 57-59; *McDermott II*, 593 F.3d at 953, 962-64. Likewise, forcing a newspaper employer to bargain—with a Union whose primary asserted goal is editorial control—over who should be hired to write the news, against the threat of government reprisal, threatens the employer's right to direct the content of her paper. For the work of a reporter-employee is

inextricably linked to the message of her employer in a way the work of other types of employees is not.

As the Ninth Circuit held in *McDermott II*:

> Telling the newspaper that it must hire specified persons, namely the discharged employees, as editors and reporters … is bound to affect what gets published. To the extent the publisher' s choice of writers affects the expressive content of its newspaper, the First Amendment protects that choice.

593 F.3d at 962 (citing *Hurley v. Irish Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572-73 (1995)). In short, the News-Press has a right to select its writers in the exercise of its right to dictate what goes into its publications.

Here, by demanding that the News-Press engage in negotiations with the Union over its staffing decisions, the Board seeks to forbid the News-Press from publishing materials written by reporters of its choosing, and to thus prevent it from publishing the materials of its choosing. This is a prior restraint on free speech, presumed to be invalid. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971); *see also Neb. Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976) ("prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights").

And it disregards this Court's instructions in *Ampersand* regarding the Board's contention that the News-Press' actions were taken out of animus. 702 F.3d at 58. Namely, that it is not "possible to parse … [the News-Press'] animus toward the Union generally from its desire to protect its editorial discretion. The motives necessarily overlapped" here. *Id.* at 58-59. The present charges are essentially no different than those rejected in *Ampersand*. For they concern the failure to bargain in good faith—a duty they do not have as to a union organized for the illicit purpose of seizing editorial control.

To be clear, the News-Press does not contend that the NLRA does not or cannot be constitutionally applied to a newspaper employer. *Assoc. Press*, 301 U.S. at 132-33. It is merely arguing that, where the Act threatens to abrogate the First Amendment rights of a newspaper-employer, it must yield. *Newspaper Guild of Greater Phila. v. NLRB*, 636 F.2d 550, 558 (D.C. Cir. 1980). Here, placing the force of government behind the demand that the News-Press bargain with a Union (whose principle stated goal is to seize editorial control) over the hiring and firing of reporter-employees (whose job duties are inextricably linked to the message of their publisher-employer) necessarily threatens the right of the paper. The Act must yield.

IV. THE BOARD'S CONCLUSIONS REGARDING VARIOUS ALLEGATIONS THAT THE NEWS-PRESS VIOLATED THE NLRA ARE NOT SUPPORTED IN LAW OR FACT

A. Wendy McCaw's August 2008 Letter

1. Factual background.

In August 2008, unrepresented employee, Amie Fowler, received a call purportedly from a woman at the NLRB on her personal cellular phone. Tr. 3071-72. As a stalking survivor who took great care to protect her telephone number, Fowler was "annoyed and angry" that her private information had been distributed, and she notified her supervisors. Tr. 3073, 3075. In turn, Fowler's supervisors correctly informed her "that it was [her] decision whether [she'd] like to contact the NLRB or not and that they would address the issue to Human Resources to find out if ... the News-Press had" released her number. Tr. 3076.

In response, McCaw distributed a letter to all employees on August 22, 2008. It read:

> Some disturbing news has recently come to my attention. I was just informed that an agent of the [Board] has contacted News-Press employees directly, including on their personal cellular telephones.
>
> ****
>
> Rest assured that neither I nor any of senior management has divulged any personal or other contact information about any non-newsroom employees to the [Board]. As I previously informed the newsroom employees, we are required by law to give

> confidential information … for the newsroom employees to the [Board] and the Teamsters union (which represents only the newsroom employees). Unfortunately, I do not know what the Teamsters and/or the [Board] has done with that newsroom employee information. However, I am committed to protecting the privacy of every employee here at the News-Press.
>
> I cannot direct you not to speak with the [Board's] agents should they, in some way, contact you. However, please note that the News-Press has retained lawyers for these matters. As News-Press employees, you may state to the [Board] agent or any Teamster operative that attempts to contact you that you are represented by counsel and to direct them to contact our lawyers.
>
> If you do not feel comfortable with speaking to the [Board] agents, you may feel free to tell them you do not wish to talk with them. These are only some of the options available to you.
>
> I ask that you not be afraid or intimidated by the [Board's] "investigation" tactics. As it has been the Union's position, so it seems that the [Board] would see us give up our First Amendment rights by prosecuting meritless charges, if only to try and make up for Judge Wilson's rebuke of those same tactics. We will not give up our First Amendment rights, to the [Board], Teamsters or anyone else, nor will we submit to any intimidation against our employees from anyone.

G.C. Ex. 124.

2. McCaw's letter is protected speech because it communicates her views and no reasonable person could interpret it as threatening or coercive.

Naturally, alleged ULPs predicated on an employer's exercise of free speech must be carefully scrutinized. To wit, an employer

has a constitutionally- and statutorily-protected right to freely "'communicate to [her] employees any of [her] general views about unionism or *any of [her] specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit.*'" *The Levy Co.*, 351 N.L.R.B. 1237, 1239 (2007) (emphasis added) (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969)). Section 8(c) puts an even finer point on the matter:

> The expressing of any views, argument[s], or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, *shall not constitute or be evidence of an [ULP]* under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(emphasis added). Because McCaw's letter merely communicates her views, and it does so without any threat of discipline or promise of benefit, it was protected and the charge should have been dismissed.

In *NLRB v. Marine World USA*, 611 F.2d 1274, 1277 (9th Cir. 1980), the Ninth Circuit held that a memoranda issued to employees before a union election was not a ULP despite being "critical" of the union because it did not, on its face, threaten reprisals of force or promise benefits depending upon the union election. There, the employer tried unsuccessfully to obtain the

Teamsters' consent to increasing wages. *Id.* at 1275. Before the union election, the president wrote two memoranda. *Id.* The first explained that "'[t]he only barrier to putting the new wage rates into effect immediately is the failure of the [prior union] to grant requested consent.'" *Id.* (quoting memorandum). The second, based on the prior union's refusal to consent, generally criticized the union's performance. *Id.*

In *NLRB v. J.W. Mortell Co.*, 440 F.2d 455 (7th Cir. 1971), the Seventh Circuit found that notices informing employees of the non-mandatory nature of Board requests to employees that they contact the Board did not violate the NLRA. *Id.* at 457-58 (adopting concurrence). Both notices clarified that if employees wished to contact the Board, they may. *Id.* at 460-61 (Pell, J., concurring). One notice stated: "You are under no obligation to discuss the case with [the Board] prior to the hearing. If you wish to discuss the matter with [the Board], you are encouraged to do so." *Id.* at 460. The other read: "Feel free to [meet with the union] or feel free to stay away. No one can legally pressure you either way." *Id.* at 461. While the court found "it is possible to infer from the wording of the notices … an intent to discourage employees from appearing," in this situation that "interpretation [was] an unduly strained one." *Id.* at 457 (maj. op.).

Here, McCaw's letter expressed her sympathy toward unrepresented employees who had received unwanted contact, and assured them that management had not disclosed their personal information. G.C. Ex. 124. McCaw informed employees, in a non-coercive manner, of the options available should the Board continue to contact them. *Id.* And she communicated her opinion regarding what she perceived to be unfair treatment by the Union and the Board. *Id.* Nowhere did she threaten reprisal for cooperating with the Board's investigation. *Id.* Nor did she direct employees not to speak with the Board. *Id.* Her letter was clear: "I cannot direct you not to speak with the NLRB's agents should they, in some way, contact you." *Id.* Like the circuit court cases above, McCaw's written communication was "well within the ambit of freedom of expression permitted by 29 U.S.C. § 158(c)." *Mortell*, 440 F.2d at 461 (conc. adopted by the maj.). No reasonable reading of the letter could be construed as an improper threat or promise. Further, there was no evidence that it interfered with the employees' right to access the Board.

Rejecting these cases, the ALJ relied entirely on *Certain-Teed Products Corp.*, 147 N.L.R.B. 1517, 1519-21 (1964), a Board decision holding that an employer's communication informing employees they were not obligated to make statements to the Board

violated the NLRA. Bd. Dec. 47-49. Like the News-Press, Certain-Teed sought to inform employees of their obligations under the law, but unlike the News-Press, it did so in a way exceedingly likely to discourage cooperation with the Board. *Id.* at 1520. Specifically, Certain-Teed told employees "that their cooperation would result in their being subpoenaed and forced to testify at a hearing." *Id.* Together with other "coercive statements" made by Certain-Teed, the threat of "being served" and forced to appear at a hearing served only to deter cooperation. *Id.* This case could hardly be more distinguishable.

Nevertheless, the ALJ was resolved to shoehorn the facts of this case into the *Certain-Teed* framework, and he set out to find that McCaw's letter was "designed to" discourage employee cooperation with the Board. Bd. Dec. 48-49. In holding that McCaw's letter was not simply "a benign, nonmalicious statement of [her] opinion" and so must have violated section 8(a)(1), the ALJ seemed particularly concerned with McCaw's history of anti-union sentiment and with remarks that he considered disparaging of the Board's treatment of the News-Press. *Id.* (citing the letter's use of "disturbing," "unfair," and "biased" to describe the Board's treatment of the newspaper). But both the First Amendment and the NLRA protect her right to express such an opinion—even if it is

critical of a government agency—as long as no threat of retaliation or promise of benefit is made. *Levy Co.*, 351 N.L.R.B. at 1239. McCaw's letter included neither, and the ALJ erred in holding that McCaw's mere expression of frustration with the Board was sufficient to violate the law.[8]

Further, the ALJ was decidedly incorrect in holding that he is free to ignore the federal court's precedents and is bound only by the decisions of the Board unless they are overturned by the Supreme Court. *Compare* Bd. Dec. at 49, *with Douglas Foods*, 251 F.3d at 1067 and *Lee Lumber and Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997). It is indisputably the role and province of the courts to interpret the law and to analyze constitutional principles—administrative agencies are not the final arbiters of the law and they are bound by the precedents the courts set. *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979) (quoting *Marbury v. Madison*, 5 U.S. 1, 137 (1803)). Because the ALJ based his decision solely on *Certain-Teed*, a Board decision, and expressly refused to follow precedent of the federal courts

[8] ALJ Anderson cited no authority that a mere expression of animus toward the Board was sufficient to violate section 8(a)(1)—which is unsurprising considering that any such ruling would violate the First Amendment.

which dictate a different result, the Board's holding that the McCaw letter violated section 8(a)(1) must be reversed.

3. McCaw's letter is not an offer of legal representation that violates section 8(a)(1).

An employer may distribute a letter to employees offering to assist them in securing legal counsel before they talk to a Board agent. This type of letter does not violate the NLRA, particularly when the letter lacks threats of reprisal, words of restraint, or words of interference with the exercise of rights guaranteed by section 7. *Fla. Steel Corp. v. NLRB*, 587 F.2d 735, 751 (5th Cir. 1979). Because McCaw's letter contained none of these characteristics, her offer of legal assistance did not violate the Act.

In *Florida Steel*, the court found no violation of the NLRA for the employer distribution of a letter that read, in relevant part:

> "In addition, if a [Board] agent should drop in on you, you may ask for an opportunity to obtain legal counsel before you talk to him.
>
> If you should want some legal counsel, or just help in handling any of the situations described above, all you need to do is let your supervisor know. He will put you in touch with someone who can help you."

Id. at 750 (quoting letter). The court concluded that the letter only offered employees legal assistance *if* the employee should want and request such help. *Id.* at 751. It rejected the Board's assertion that the letter was coercive, compulsory, or a restraint on employee

rights. *Id.* And the court explained that nothing in the letter *required or compelled* the employee to do anything. *Id.* Further, there was no evidence that any employee was *actually* coerced or compelled to do or not do anything or that any employee's rights were restrained. *Id.*

The same applies to McCaw's letter. McCaw simply informed that employees "may" direct the Board or the Union to News-Press counsel if they so desired—that it was one of several "options" available to them. G.C. Ex.124. The letter in no way compelled employees to act. There was no coercion or threat of reprisal, nor was there any threat of force accompanying the offer to assist employees in seeking out legal representation. The Board's conclusion that this harmless offer violated section 8(a)(1) was error.

B. December 2008 Staff Meeting

1. Factual background.

The News-Press hired Donald Katich as Director of News Operations on September 15, 2008. Tr. 3193-94. Sometime thereafter, Katich met with Assistant Editor Scott Steepleton to learn "who the key players were, who the managers were, who the writers were, some of the basic structure that's in place within the newsroom, primary areas of responsibility or of expertise,

productivity, schedules." Tr. 3198. In that meeting, Steepleton informed Katich that, on average, employees produced one article per day in the course of a given week and that many employees often exceeded that expectation. Tr. 3198-99. That longstanding expectation for productivity was established on the record by some 45 performance evaluation statements, praising employees who met or exceeded the "story-per-day" expectation or rebuking those who did not. R. Exs. 747-56, 758-70, 772-76, 778-79, 781, 796, 1090, 1092, 1115A, 1115E, 1115F, 1115J, 1115Q.

On December 3, 2008, in light of the closure of the *Goleta Valley Voice* and the *Santa Ynez Valley Living*, two sister publications, Katich called a meeting for newsroom employees to "give some hope, some guidance" to News-Press staff. Tr. 1353, 1693-94, 2873, 3169, 3201-04. By all accounts, Katich commenced the meeting by informing employees of the closures and reassuring them that layoffs related to the closures would not affect them. Tr. 1693-94, 2873-74, 3201-04.

After announcing that there would be no layoffs in the newsroom, Katich informed staff that he considered the information he would disclose to be a "trade secret," in hopes "the words that [he] spoke, the direction that [he] communicated to the newsroom

would not appear in the blog-sphere or in [the News-Press'] competition as—did [the] report about the 17 layoffs." Tr. 3209.

From there, he informed staff of the ways the News-Press intended to stay competitive in the newspaper industry. Katich's pre-meeting notes indicate he explained that the paper would:

- "[H]ave a posted work schedule and every reporter/writer [would] be responsible for a minimum of one story per day and one story for the weekend";
- "[A]ssign/schedule Feature stories 60 days in advance";
- "dominate our Lead story, at time assigning two resources to cover the story";
- "[M]ake better use of our graphics design capabilities";
- "[H]ave the the [sic] best photojournalists in the market";
- "[M]igrate to [a new type of technology] aggressively pursuing greater efficiency";
- "[R]emove any artificial barrier that hinders our ability to proceed"; and
- "[P]rovide LIVE streaming over Newspress.com...."

Bd. Dec. 52. Katich's remarks regarding the "story-a-day" expectation were not expanded upon and, though given an opportunity, no employee requested clarification. *Id.*

In the days that followed, a few employees questioned how the "story-a-day" expectation would impact them. Steepleton testified that he met with those employees on December 9, 2008, and informed them it was but "a goal to shoot for." *Id.* As the ALJ recognized, "the conversation continued with the employees seeking specifics as to length and deadline for submission requirements. Steepleton assured them flexibility would apply." *Id.*

In a letter responding to the Union's concerns regarding Katich's comments, the News-Press clarified that the "story-a-day" expectation was "no new 'policy,'" that it was a "preexisting practice," as the Union's letter recognized, and that the News-Press would not "discipline any employees for failing to meet goals that are greater than historic productivity standards." G.C. Ex. 103 at 3. With regard to Katich's request for meeting confidentiality, the letter read:

> Katich informed reporters that the information pertaining to the business strategy … was proprietary and confidential. Employees were informed of how management has decided to reorganize the content of the newspaper, as well as how management intends to dedicate resources. This information was considered a trade secret that is confidential and proprietary information that [the News-Press] expected employees to not share with any competing news outlets.
>
> [The News-Press] is well aware of employees' right to discuss terms and conditions of employment with [the Union], and in no way were employees directed to

> withhold any information pertaining to terms and conditions of employment from [the Union]…. To the extent an employee interpreted anything to reflect such a prohibition, that employees' [sic] interpretation is unreasonable and unsupported. Of course employees can discuss terms and conditions with the union and among themselves.

Id.

The Union filed a charge that the News-Press unilaterally changed the terms of employment when it announced its expectation that employees strive to produce one-story-per-day in violation of section 8(a)(5). It filed a separate charge that Katich's confidentiality request violated section 8(a)(1).

2. Katich's "story-a-day" announcement did not violate section 8(a)(5) because it was not a material change to the scope of employment.

Section 8(a)(5) requires employers to bargain over employment terms and conditions. 29 U.S.C. § 158(a)(5). An employer's unilateral change of existing conditions is only unlawful if it is "material, substantial, and significant." *Microimage Disp. Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 253 (D.C. Cir. 1991) (citing *Alamo Cement Co.*, 281 N.L.R.B. 737, 738 (1986), *Peerless Food Prods.*, 236 N.L.R.B. 161 (1978), and *Rust Craft Broad. of N.Y., Inc.*, 225 N.L.R.B. 327 (1976)). "General Counsel bears the burden of establishing that the" materiality standard is met. *N. Star Steel Co.*, 347 N.L.R.B. 1364, 1367 (2006). Here, the record does not establish

that Katich's "story-a-day" announcement was a change from News-Press' established practice, let alone that it had a material impact on employees' working conditions. Indeed, the Board's decision does not address materiality at all.

Fundamentally, Katich's announcement signaled no new requirement—it was merely a reiteration of the News-Press' longstanding goal to encourage greater newsroom productivity during a downturn in the industry. Before Katich arrived at the News-Press, the newspaper maintained an expectation that its employees maximize productivity, often communicating to employees that they should make at least one contribution to the paper per day. *See* Argument, Part IV.B.1, *supra*. Since 2000, employees have been reprimanded for failure to meet that expectation, while others were lauded for meeting or exceeding it, R. Exs. 747-56, 758-70, 772-76, 778-79, 796, 1090, 1092, 1115A, 1115E, 1115F, 1115J, 1115Q.

Not surprisingly, employees described Katich's remarks as he intended them—as a workplace "pep talk" meant to motivate employees in a down economy after a large-scale lay-off. Tr. 1415, 2882. To the few employees who voiced concern about the announcement, Steepleton clarified that the expectation was "but a goal to shoot for," Tr. 2887, assured that "flexibility would apply,"

Bd. Dec. 52, and brainstormed ways the writers could be more productive, *id.* at 53. The News-Press also clarified to the Union in writing that it was not implementing a new production requirement, and that it had no intention of disciplining employees who did not meet the paper's historical productivity expectations. G.C. Ex. 103. In short, the announcement demonstrated no change in policy.

In the face of this record, the ALJ reviewed Katich's personal, pre-meeting notes and held that the story-a-day expectation was a "new" "requirement" set to take effect "immediately." Bd. Dec. 52, 56. True, Katich's notes read that "starting immediately, all of [the News-Press'] efforts, every day go towards building up this paper." R. Ex. 1111. And what followed in Katich's notes was a list of strategies aimed at ensuring the paper's survival, the story-a-day expectation among them. *Id.* But rather than simply attribute "starting immediately" to the News-Press' intention to begin "building up" the newspaper, the ALJ attributed it to every paragraph that followed, assuming that the News-Press intended to take each listed action "starting immediately" because it had never before taken any of those steps. An odd assumption to be sure, considering the list included such items as having "the best photojournalists in the market." *Id.* Certainly the News-Press has long sought to employ the best in the business. Just as it had long

expected its journalists to be productive members of the newsroom. What news business wouldn't?

Essentially, the Board faults Katich for drafting personal meeting notes in a format that did not separate new business strategies from ones that merely needed to be repeated—and shockingly ruled that action rises to the level of an unfair labor practice. The ALJ's interpretation of Katich's notes was unreasonable, and it does not support the Board's conclusion that the story-a-day announcement signaled a "change" in working conditions.

Regardless, it is clear that the record does not support a finding that the announcement had any significant or material impact on the working conditions of any News-Press employee. The Board's failure to make any finding regarding materiality makes its conclusions fundamentally flawed.

In *Vincci USA, LLC*, No. 2-CA-26910, 2006 WL 1895044, *17 (July 6, 2006), the ALJ reviewed an employer's unilateral change in housekeeping duties and found it did not constitute a "material change" under the NLRA. There, the hotel-workers had previously been responsible for cleaning 10 rooms and completing one additional "project" daily. *Id.* at *9. The employer eliminated the additional daily "project", but required employees to complete

additional housekeeping tasks in each room. *Id.* Several employees testified that it took them longer to complete their work and that some tasks would have to wait until the next day. *Id.* at *10.

While the *Vincci* employees claimed the volume of their work had increased, no employee provided specific testimony as to how much longer their tasks took, *id.* at *10, and all employees acknowledged that their regular working hours did not change, *id.* The ALJ thus found the evidence submitted "too vague and lacking in specific detail" to establish that the change was "material." *Id.* at *17 (reasoning also that "there is insufficient specific evidence as to how much time is actually involved: the one fact which is known is that the official work hours of employees in the Housekeeping Department have not changed"). She thus recommended the charge be dismissed.[9]

Here, there was absolutely no evidence that any News-Press employee actually worked more after Katich's announcement, nor

[9] For support, *Vincci* cites *Flambeau Airmold Corp.*, 334 N.L.R.B. 165, 172 (2001), "where the positions of several employees were eliminated with other employees required to 'pick up' their responsibilities." *Vincci*, 2006 WL 1895044, at *17, n.42. There, the Board found no violation had occurred as to those employees who "pick[ed] up" extra duties, because there was "no evidence establishing that this was a material change," citing a lack of "*specific evidence* regarding the difficulty of the newly-assigned tasks or *the amount of time they took to perform*." *Id.* (citing *Flambeau*, 334 N.L.R.B. at 172) (emphasis added).

was there specific evidence regarding the amount of time employees spent on their "new" daily responsibilities. Like the employees in *Vincci*, employee Hughes testified that she *felt* like she had to work harder to meet the expectation, going so far as to suggest she was working overtime, Tr. 1703-05, but her timecards told a different story. R. Ex. 978 (she worked only 2 hours of overtime, but took *nearly 134 hours* off between December 2008 and June 2009). In fact, an examination of all employees' timecards between June 2008 and June 2009 demonstrated *no increase in hours worked at all*. R. Exs. 1066-77. As hard as ALJ Anderson tried to extract an explanation from Hughes as to just *how* the expectation affected the way she worked, he was unable to draw out of her specifically how much time was involved in writing the articles the News-Press expected of her. Tr. 1703-06. He eventually just gave up. *Id.* 1706.

Plainly, any of the employees' "subjective assessments" that the alleged "change" increased their workload, like those made in *Vincci*, are simply "too vague and lacking in specific detail to meet" the Board's own materiality standard for unilateral changes to working conditions. 2006 WL 1895044, at * 17.

Further, like the immaterial changes made to work duties in *Vincci* and the cases cited therein, the story-a-day goal cannot be said to be outside "the compass of the job duties the affected

employees were hired to perform." *Id.* at * 17; *see also Little Rock Downtowner, Inc.*, 148 N.L.R.B. 717, 719 (1964) (holding employer did not violate the Act when it unilaterally instructed employees to wash windows everyday even though employer had previously abandoned that standard). As employee Mason explained, employees were simply expected to be more efficient with their time, drafting fewer long stories in favor of more short stories. Tr. 3180-81. The employees here are reporters hired to write articles. The News-Press' decision to refocus the sorts of stories it sought to print did not fundamentally alter the type of work the employees were hired to do, nor was there evidence that it actually changed the hours they worked. *But see KIRO, Inc.*, 317 N.L.R.B. 1325, 1327 (1995) (employer made a material, unilateral change when it added a news program that required split shifts and increased hours and workloads).[10]

To the extent that Katich's story-a-day announcement signaled a unilateral "change" in working conditions at the News-Press at all, it was not the sort of "material, substantial, … and significant" change that triggers an obligation to bargain under the Act. *Vincci*,

[10] Of course, the News-Press' decision in that regard—a matter of editorial discretion—cannot be made subject to the whims of the Union through bargaining. *KIRO*, 317 N.L.R.B. at 1327.

2006 WL 1895044, at *17 (quoting *Peerless*, 236 N.L.R.B. 161, 161, and *Millard Proc. Servs.*, 310 N.L.R.B. 421, 425 (1993)).

3. Katich's request for confidentiality did not violate section 8(a)(1) because he did not seek to prevent employees from discussing the terms of their employment or the ongoing union dispute.

Section 8(a)(1) prohibits employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise" of their section 7 rights to organize for the purpose of collective bargaining. 29 U.S.C. § 158(a)(1). As the Supreme Court has held, section 7 "necessarily encompasses [employees'] right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Isr. Hosp. v. NLRB*, 437 U.S. 483, 491 (1978). To that end, this Court has employed the Act to protect an employee's right to discuss employment terms and conditions with other employees, *see Cintas Corp. v. NLRB*, 482 F.3d 463, 466 (D.C. Cir. 2007) (citing *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002)), and with nonemployees, *see id.* (citing *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003)). And the Board has applied the law to the right to communicate with the media regarding labor disputes. *Crowne Plaza Hotel*, 352 N.L.R.B. 382, 386 (2008). But, here, Katich's comments dealt with neither the terms and conditions of employment nor the ongoing union dispute. He never

demanded that employees keep discussions regarding either confidential.

The ALJ, however, concluded that Katich's request for confidentiality regarding the December 2008 meeting violated the Act, citing *Crowne Plaza* for support. Bd. Dec. 55. But that case is hardly instructive. There, a hotel maintained a broad, written policy that comments regarding "any incident ... that generates significant public interest" may be made only by designated representatives and that, "[u]nder no circumstances" could employees supply such statements to the press. *Id.* at 385. The policy applied at all times, as to any incident generating significant public interest. The Board found it could not reasonably be read to exempt statements by employees to the press regarding labor disputes. *Id.* at 386.

Here, the confidentiality request was not nearly so broad. It was not a blanket mandate barring employee communications regarding newsworthy events with the media. It sought only to prevent competing news outlets from acquiring specific proprietary information discussed at the meeting, including business plans to "aggressively" pursue greater efficiency, attract the best photojournalists, and dominate lead stories. Bd. Dec. 52. Nothing in the record establishes that the meeting concerned the labor dispute at all, and the ALJ cites nothing. *See id.* at 51-56. Yet, his decision

focuses almost singularly on employees' rights to discuss the labor dispute with the media. *Id.* at 55-56. It seems the ALJ simply assumed that, because there was an ongoing union dispute, *id.* at 55, the request *must* have been meant to prevent employees from discussing that dispute—even though nothing in the record suggested it was.

To the extent that the alleged violation was predicated on concerns that the News-Press sought to prevent employees from discussing employment terms, the decision is equally unsupported. Where, as here, there is no "express language prohibiting section 7 activity," the Board must "determine whether 'employees *would reasonably* construe the [disputed] language to prohibit'" it. *Cintas Corp.*, 482 F.3d at 467 (quoting *Guardsmark v. NLRB*, 475 F.3d 369, 374-76 (D.C. Cir. 2007)). Nowhere in his discussion of the confidentiality allegations does the ALJ acknowledge this test, and he never makes the required inquiry. Bd. Dec. 55-56. The decision is thus void of any finding that employees would reasonably have understood Katich's request to bar them from discussing employment terms and conditions. *Id.* Indeed, the decision makes no attempt to determine whether the confidentiality request pertained to employment terms at all. *Id.* This was reversible error. *See Adtranz ADB Daimler-Benz Transp. v. NLRB*, 253 F.3d 19, 29

(D.C. Cir. 2001) (noting that the Board may not "cavalierly declare policies" "facially invalid without evidence," "particularly where … there are legitimate business purposes for the rule").

C. The Union's Information Requests

1. Factual background.

Over a 17-month period, in the course of bargaining, the Union employed a strategy of bludgeoning the News-Press with repeated, often-detailed information requests—making at least 26 documented demands for information. R. Ex. 1060 (rejected); Resp. Br. Supp. Exceptions, App. 1 (Sept. 23, 2010). The News-Press responded in good faith to each one. Resp. Br. Supp. Exceptions, App. 1 (Sept. 23, 2010). Of those 26 requests, the Board pursued charges regarding just a handful of them, on the grounds that the News-Press took too long to respond. R. Ex. 1060 (rejected); Resp. Br. Supp. Exceptions, App. 1. There was no claim that the company failed to respond to a valid request. Bd. Dec. 15.

During the parties' first bargaining session on November 13, 2007, the Union requested information about temporary employees. Tr. 2430-32. The Union submitted that request in writing on November 16. G.C. Ex. 21, 52; Tr. 2431. The written request demanded that the News-Press provide the "full and complete rationales(s) [sic] explaining why the nine 'temporary' employees"

were not part of the bargaining unit and laid out seven other very specific requests regarding the hiring of each agency-provided employee (e.g., whether the employee responded to a communication from the agency to begin or continue the hiring process). G.C. Ex. 21. The request did not expressly identify the relevance of this specific information to the ongoing negotiations or establish that the Union was otherwise entitled to it. *Id.* Instead, without any application to the facts of this case, the Union named three cases suggesting that the cited authority supported its request. *Id.*

The Union demanded the responsive information within two weeks, even though it was aware the News-Press had a briefing deadline in the then-pending labor dispute before Kocol and its unilaterally imposed deadline was likely to conflict with the Thanksgiving holiday. G.C. Ex. 52. When the News-Press was unable to meet the Union's artificial deadline, the Union filed a ULP on November 27. *Id.* The News-Press wrote to the Union, explaining the delay and assuring it would respond within a reasonable time as required by law. *Id.* The News-Press did so on January 23, 2008. G.C. Ex. 39.

On December 3, 2007, the Union made *additional* requests concerning temporary employees—information, it would turn out,

the News-Press had already provided on November 14. G.C. Ex. 29, 39. Like the November demand, the Union's December request did not identify the relevance of the information sought. G.C. Ex. 29. Rather, it cited the same three cases without any explanation as to how they apply. *Id.* Counsel for the News-Press responded on December 10, reminding the Union that he would be in trial for two weeks, but that the News-Press would provide a response sometime after December 14. G.C. Ex. 31. Following the trial, holidays, and a careful review of the information available, the News-Press provided a substantive response on January 30, 2008 G.C. Ex. 40.

On August 6, 2008, the Union made a "standing" request to be informed within one-to-two days whenever an employee is hired, terminated, or has an employment status change. G.C. Ex. 75. In response, the News-Press produced a roster of bargaining-unit employees at negotiations on September 3. G.C. Ex. 411; R. Ex. 552; Tr. 2465-66. Nonetheless, the Union wrote on September 9, complaining that the News-Press had not responded to the August request and expanding the scope of that request. G.C. Ex. 84.

At negotiations on October 22, the News-Press provided further information regarding changes to the bargaining-unit employee list of July 10, 2008. G.C. Ex. 420; R. Ex. 572. But on October 24, 2008, the News-Press wrote to the Union that, as had

already been explained, it did not believe standing information requests were valid. G.C. Ex. 89. The News-Press invited the Union to provide legal authority justifying its request or rescind it, *id.*, but the Union never did. Instead, it filed ULP charges.

2. The Union did not identify the relevance of information regarding temporary employees, and it was not entitled to a response pursuant to section 8(a)(5).

Section 8(a)(5) obligates an employer to provide, on request, information that the union needs for the proper performance of its duties as a collective-bargaining representative. *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998); *Disneyland Park*, 350 N.L.R.B. 1256, 1257 (2007). Before the employer is bound to respond, however, the union must establish that the information sought is relevant. *N.Y. & Presby. Hosp. v. NLRB*, 649 F.3d 723, 730 (D.C. Cir. 2011). While the relevance of information pertaining to bargaining unit employees is presumed, *U.S. Testing*, 160 F.3d at 19, when the information requested concerns matters outside the bargaining unit, such as matters regarding temporary employees provided by third-party agencies, the union must demonstrate its relevance, *N.Y. & Presby. Hosp.*, 649 F.3d at 730; *St. George Warehouse, Inc.*, 341 N.L.R.B. 904 (2004). That burden is satisfied only when it demonstrates a reasonable belief, supported by

objective evidence, that the requested information is relevant or that its relevance is apparent to the employer under the circumstances. *Disneyland*, 350 N.L.R.B. at 1257-58. The union's explanation "must be made with some precision"—"a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." *Id.* at 1258 n.5.

In this case, the Union's November and December requests provided no evidence demonstrating the relevance of the information sought. The Union simply relied on a general citation to three marginally applicable cases, two of which do not pertain the relevancy of information requests at all. G.C. Ex.21 (citing *Torrington Enters.*, 307 N.L.R.B. 809 (1992); *Sociedad Espanola de Auxilio Mutuo y Beneficencia, de P.R.*, 342 N.L.R.B. No. 40 (July 13, 2004)). While the third case cited, *St. George Warehouse, Inc.*, 341 N.L.R.B. 904, did involve the relevance of information requests regarding temporary employees, it did not involve a request for the sorts of *detailed* information sought by the Union here. The request was limited to basic information about employees, including names, contact information, and employment terms. *Id.* at 925. More importantly, the union there laid out expressly *why* the information sought was relevant. *Id.*

The same cannot be said of the Union's requests, which laid out very specific questions seeking details about the hiring, employment, and supervision of every temporary employee working for the News-Press. G.C. Ex. 21. Further, apart from generally citing three cases without establishing their applicability to the request, the Union never described why it was entitled to the detailed information it sought. *Id.*

Nor was there evidence that the relevance of the information request was or should have been apparent to the News-Press at the time. The News-Press had *already* provided the Union with the temporary employees' general information (of the sort sought in *St. George's Warehouse*), G.C. Ex. 89, and it is not clear whether questions about how temporary employees came to learn of job opportunities at the News-Press is relevant to any alleged violation of the NLRA. Similarly, it is not apparent why the names of all the people who participated in the decision to hire the temporary employees is relevant to any alleged ULP. Neither request would yield facts dispositive of whether the News-Press was violating the law.

In sum, the November and December requests provided nothing to demonstrate the relevance of the information sought, nor was the relevance apparent under the circumstances. As such, the

Union failed to satisfy its initial burden to establish relevancy, so the News-Press was never obligated to provide the information sought. The fact that it did, out of professional courtesy or an abundance of caution, did not absolve the Union of its duty to establish relevance *before* the News-Press' obligation to respond arose. The Board's analytical gloss, assuming the relevance of the information sought, gave short shrift to the foundational question of relevancy and prematurely shifted the burden to the News-Press to defend the length of time it took to respond to an otherwise improper information request. The decision cannot stand.

3. The law does not recognize an obligation to respond to "standing" information requests.

The General Counsel has the burden to demonstrate that an information request is valid. *See, e.g.*, *Mission Foods*, 345 NLRB 788, 791 (2005). From the outset, the News-Press has contested the validity of "standing" information requests and the company's duty to respond to them. Bd. Dec. 50; G.C. Ex. 89; Resp. Br. Supp. Exceptions 20-24. The General Counsel argued, and the Board ruled, that the News-Press failed to cite authority for the proposition that a standing information request was improper. Bd. Dec. 50-51. But the analysis improperly shifts the burden of proof, requiring the News-Press to establish the invalidity of the request,

before demanding that the General Counsel prove otherwise. The News-Press remains unaware of any authority authorizing the Union's standing request, and neither the Union nor the Board cited to anything below.

In any event, prosecuting ULPs predicated on the failure to timely respond to a standing information request is simply bad public policy. Such requests offend the NLRA, insofar as they do not foster a good bargaining relationship between the parties, and they engage the Board's investigatory and enforcement mechanisms in the furtherance of dubious violations of the law. *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 488 (1960) (recognizing the legislative policy of the Act is to "promot[e] industrial peace"). Importantly, standing requests induce their recipients to violate the Act for they never emerge from the obligation to respond—and Board prosecution of such violations becomes a game of government-sponsored "gotcha"!

Ultimately, the mutual duty to respond to information requests are meant to foster a good bargaining relationship. But for the obligation to respond to be triggered, a valid request must be made. A standing request transfers the burden of compliance to the company before the union makes an affirmative, specific request for information. It necessarily complicates the bargaining relationship

as the recipient lives with the sword of Damocles hanging over head—always in danger of violating the Act for failure to timely respond to an information request that has no clear beginning (triggering a duty to respond) or end (relieving the recipient of that duty). The entire scheme is highly suspect. If a party desires information, it should make an affirmative request and the recipient should respond.

D. Suspending Wage Increases

Section 8(a)(1) and (5) requires parties in a collective bargaining relationship to negotiate in good faith over wages. 29 U.S.C. § 158(d). An employer violates the Act when it unilaterally alters wages without first negotiating with the union. *NLRB v. Katz*, 369 U.S. 736, 746 (1962). An employer can, however, make a unilateral change to wages when the change is consistent with the employer's past practice and maintains the status quo. *Id.* And this Court has expressed doubt as to whether an employer who retains total discretion to deny raises (basing the choice on a mix of factors of its choosing) would be in violation of section 8(a)(1) and (5) if it chose to discontinue raises during collective bargaining. *Acme Die Casting v. NLRB*, 93 F.3d 854, 857 (D.C. Cir. 1996).[11]

[11] In *Acme*, this Court also recognized that "the Board's perspective [regarding discretion to deny wages] seems to shift from case to case." 93 F.3d at 858. Indeed, "[p]redicting whether the

Without analysis, the ALJ assumed that the News-Press' wage increase determinations were not fully discretionary—and that they were based entirely on merit. Bd. Dec. 63-64. [12] But the News-Press has always retained total discretion to deny employee raises based on any number of factors. The News-Press' Employee Handbook states the following:

- "Performance reviews are *only one of a number* of factors that are considered in determining compensation." G.C. Ex. 125 at 15 (emphasis added).
- "*Other factors may include, but are not limited to* merit, position, and general business and economic conditions." *Id.* (emphasis added).

Board will view a pattern of wage increases as established or discretionary has proven difficult not only for employers and employees, but for the Board's own ALJs as well." *Id.* Even after this Court remanded the issue with instructions "to illuminate the 'borderline' between a settled practice [of granting wage increases] and a discretionary one," the Board "not only failed to formulate a rule, it failed even to explain why it was unable to do so-if that indeed was the case." *Id.*

[12] While the ALJ did cite *Dynatron/Bondo*, 323 NLRB 1263 (1997), for factors the Board has used to determine that an employer's previous granting of raises was not an established past practice—including whether the sole, fixed criterion was merit—he did not explain how those factors work, nor did he apply them to the facts of this case. Bd. Dec. 63-64.

- "Any and all compensation increases are at the sole discretion of the News-Press." *Id.*

The News-Press never revised this policy prior to the start of the bargaining relationship, and its policy on raises remained completely discretionary. It is at least doubtful then that the denial of raises between 2006-2008 could violate section 8 of the Act. *See Acme*, 93 F.3d at 857.

But even if the News-Press' historical practice was not to exercise full discretion over wage increases, but to base such decisions on a merit-based system, the company would have been placed in the unenviable position of violating the Act no matter what it chose to do. For "[a]n employer with a past history of a merit increase program neither may discontinue that program … nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected." *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1163 (D.C. Cir. 1992) (citing *Oneita Knitting Mills*, 205 N.L.R.B. 500, 500 n.1 (1973)). Instead, [w]hat is required is a maintenance of preexisting practices, i.e., the *general outline* of the program…." *Id.* (emphasis added).

Since the News-Press had long exercised discretion when determining whether to grant or deny raises, it could neither give

nor deny raises in 2006, after the employees organized, because either would constitute an unlawful unilateral change unless the News-Press notified and bargained with the Union. But because the News-Press had not yet begun bargaining with the Union, the News-Press was only required to maintain the general outline of the program, i.e., complete performance evaluations. Which it did. *See e.g.*, R. Ex. 1109E (McMahon 2006); G.C. Ex. 245; R. Ex. 1090; *see also* R. Ex. 1109E (Hughes 2006); G.C. Ex.179; R. Ex. 796.

Thereafter, when the News-Press brought the issue of wage increases to the bargaining table, the Union waived its right to bargain over the issue, expressly authorizing the News-Press to continue treating wages as it always had. It is well-established that a union may waive its right to bargain over its members' collective and individual economic rights under the Act, including wage adjustments. *Metro. Edison Co.*, 460 U.S. 693, 705-06 (1983); *Hammontree v. NLRB*, 925 F.2d 1486, 1502 (D.C. Cir. 1991); *see also Daily News of L.A. v. NLRB*, 979 F.2d 1571, 1575-76 (D.C. Cir. 1992) (assuming that waiver doctrine applies in the context of wage negotiations). Throughout negotiations, the Union did just that.

First, with knowledge that the News-Press had not awarded any raises to employees for the work that was performed in 2006, G.C. Exs. 30, 37; R. Ex. 347, the Union told the News-Press that it

wanted to maintain the status quo and directed the News-Press to "continue to do what you normally do." Tr. 1953-55; *see also* R. Ex. 347; G.C. 30. Even if the Union did not mean for the News-Press to continue with the status quo existing at that time (i.e., not issuing raises until after it is resolved through bargaining), the Union did recognize that the News-Press normally exercised discretion to determine wage increases based on a non-exhaustive list of factors. In fact, the Union confirmed this in its December 4, 2007 letter, stating that it "would like to know *if* and when the bonuses are paid for 2007, the amounts paid to the employees and the *basis* for the payment *or lack of payment*." G.C. Ex. 30 (emphasis added).

Then, on February 24, 2008, the News-Press again offered to negotiate the issue of wage increases, presenting the Union with its "Position on Wage Adjustments." G.C. Ex. 348. This document proposed that "any further wage adjustments are to be negotiated at the bargaining table by the Union and the Company." *Id.* The Union did not respond and the News-Press reasonably took the Union's silence as further evidence of the Union's waiver of the right to bargain wage increases with the News-Press, authorizing the paper to proceed with its previous practice. Based upon the multitude of factors that the News-Press considered in determining wage increases (e.g., position, general business and economic

conditions, performance evaluations, and merit), the News-Press determined that it would not award raises for work performed in 2006, 2007, and 2008. As further indication of the Union's disinterest in bargaining over wage increases, the Union waited until January 15, 2009, to verbally raise the issue. G.C. Ex. 47.

Based on the Union's voluntary relinquishment of the right to bargain over wage increases and its lack of diligence regarding the issue, the News-Press was justified in continuing to exercise its full discretion over wages and its conduct was not unlawful.

E. Failure to Bargain in Good Faith

1. The Union's misconduct absolved the News-Press of liability for bad-faith bargaining.

It is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). "[T]o bargain collectively," section 8(d) explains, is to observe "the *mutual obligation* … to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement…." *Id.* § 158(d) (emphasis added). Because the obligation is *mutual*, the conduct of *both* parties must be scrutinized. *Bridon Cordage, Inc.*, 329 N.L.R.B. 258, 265 (1999). For a union's "own bad faith bargaining may 'effectively excuse[] the [employer's] obligation

to bargain.'" *Id.* (quoting *Seafarers Local 777 (Yellow Cab Co.) v. NLRB*, 603 F.2d 862, 911 (D.C. Cir. 1978)); *see also Super. Engraving Co. v. NLRB*, 183 F.2d 783, 794 (7th Cir. 1950) (recognizing that "an employer cannot be guilty of a refusal to bargain if the Union is not itself bargaining in good faith").

Here, the Board wrongly rejected the News-Press' defense that the Union's own conduct constituted bad-faith bargaining that stifled progress toward agreement. As three federal courts have recognized, the Union was organized primarily to seize editorial control from the News-Press, and it "'undertook *continual* action to do so.'" *Ampersand*, 702 F.3d at 59 (emphasis added) (quoting *McDermott I*, 2008 WL 862728, at *12, quoted in *McDermott II*, 593 F.3d at 961). At the bargaining table, and away from it, the Union's unrepentant pursuit of that improper goal so tainted the bargaining relationship that it is impossible to parse any animus the News-Press may have harbored "'toward the Union generally from its desire to protect its editorial discretion.'" *Id.* (quoting *McDermott I*, 2008 WL 862728, at *12, quoted in *McDermott II*, 593 F.3d at 961). In other words, the protective actions the News-Press took at the bargaining table were either in direct response to the Union's unprotected conduct or inextricably linked to it. Its actions were

therefore both protected by the First Amendment and not unlawful (i.e., not made in "bad faith").

Away from the table, the Union and its supporters held rallies and engaged in other conduct to urge the News-Press to "restore" "the wall between opinion and news." *Id.* at 54. For instance, the Union:

- Orchestrated an extensive campaign to persuade the paper's readers to cancel their subscriptions in support of the "effort to restore journalistic integrity." *Id.*
- Went on local radio, disparaging the News-Press and beseeching listeners to support the battle to gain control of the paper. R. Ex. 1105.
- Hung banners over a major roadway, urging drivers to cancel their subscriptions and "Protect Free Speech." *Ampersand*, 702 F.3d at 54.
- Met with News-Press advertisers, demanding they support their fight for an agreement that would "ensure that [they] can … report the news without interference" from the publisher. *Ampersand*, 357 N.L.R.B. No. 51, 84.

In essence, the Union made every attempt to deny the News-Press of its First Amendment rights of expression, all while campaigning to destroy the newspaper if it failed to respect a novel, unprotected

"right" of its employees to write the news without interference from their employer. Even after the federal courts twice rebuked those tactics, the Union continued to assert that it had a right to demand the News-Press cede control late into 2012 throughout Board proceedings, *id.*, and while on review by this Court, *Ampersand*, 702 F.3d 52 (argued November 8, 2012).

Meanwhile, at the table, the Union consistently engaged in conditional bargaining by demanding, as a term of employment, that employees or the Union have the power to challenge the publisher's content decisions (e.g., through protests, subjective determinations, and grievance and arbitration). *See e.g.*, G.C. Exs. 18, 345, 353, 360, 375; R. Exs. 345, 365, 395, 407, 437, 449, 459, 471, 646. The Union's proposals on management rights, grievance and arbitration, and discipline and discharge all combined to limit the News-Press' editorial control by transferring such decisions to the Union. G.C. Ex. 18. And the Union's introduction, withdrawal, and reintroduction of its "Employee Integrity" proposal, a clause aimed at giving reporter-employees varying degrees of control over their work product, generally hampered bargaining and stifled progress toward agreement. G.C. Exs. 18, 64, 84, 367, 373, 404; R. Exs. 263, 651-52. Indeed, each time the Union appeared to concede that the News-Press alone had the right to control content, it would

reintroduce the same concept in different wrapping, but always implicating mandatory subjects of bargaining, including management rights, grievance and arbitration, and discipline and discharge.

The Board wrongly rejected the News-Press' concerns that the Union's "Employee Integrity" proposals constituted improper attempts to bargain over content control, which in conjunction with other proposals stymied the bargaining process. Bd. Dec. 22. The Board compounded its error, holding those proposals merely to be "permissive" subjects of bargaining and not evidence of bad-faith. *Id.* By the time the Board issued its March 2015 decision, three federal courts had held, in no uncertain terms, that the Union's quest for editorial control was an illicit organizing purpose that, if sanctified by the government, posed a serious risk to the News-Press' constitutional rights. *Ampersand*, 702 F.3d at 58; *McDermott II*, 593 F.3d at 961; *McDermott I*, 2008 WL 8628728, at *12. Far from a harmless and lawful exercise of the Union's prerogative to insist on "permissive" bargaining subjects, the Union's conduct was coercive by its very nature. For it placed the News-Press' constitutional rights on the bargaining-table under threat of government reprisal.

Indeed, the Ninth Circuit in *McDermott II* recognized the risk to the News-Press' First Amendment rights from bargaining-table negotiations centered on employee demands for "journalistic integrity." 593 F.3d at 961-62 (finding government intervention supporting the employees' demands would stifle the News-Press' ability to resist employee efforts to seize editorial control, *necessarily* posing risks to the News-Press' rights to free press). That risk materialized when the Union insisted that the parties bargain over matters of content control and then threatened to file ULPs to compel the News-Press to reconsider its refusal to do so. G.C. Ex. 84. The Union's demand forced the News-Press to navigate between Scylla and Charybdis—accept the Union's content proposals or defend against ULPs for failure to bargain over them.

The Union's conduct was not harmless, and it reasonably led the News-Press to take protective measures at the bargaining table. It is not uncommon for initial bargaining "to take place in an atmosphere of hard feelings left over from an acrimonious organizing campaign...." *Lee Lumber & Bldg. Mat. Corp.*, 334 N.L.R.B. 399, 403 (2001). Here, that post-campaign hangover included "hard feelings" over highly publicized Union efforts to control the voice of the News-Press. Considering the impossibility of parsing the newspaper's "animus toward the Union generally from

its desire to protect its editorial discretion," *Ampersand*, 702 F.3d at 58-59 (citations omitted), it is unsurprising the News-Press remained hypervigilant regarding the abrogation of its rights whenever a Union proposal treaded near issues of content control. It is hardly evidence of bad-faith.

2. The totality of the circumstances does not establish that the News-Press bargained in bad-faith.

In any event, a review of the record as a whole does not support the Board's finding that the News-Press engaged in bad-faith bargaining in violation of section 8(a)(1) and (5). The charge is grounded, primarily, in the claim that the News-Press rigidly adhered to proposals "predictably unacceptable" to the Union. Bd. Dec. 83. In essence, the Board claims that the News-Press engaged in unlawful "surface bargaining," merely going through the motions with no intention to reach agreement, tendering proposals that it knew would be an anathema to the other side. *Id.* But the News-Press was merely engaged in lawful "hard bargaining," and distinguishing that conduct "from surface bargaining calls for sifting a complex array of facts, which taken in isolation may often be ambiguous." *E. Me. Med. Ctr. v. NLRB*, 658 F.2d 1, 10 (1st Cir. 1981) (citation omitted); *Brown v. Pro Football, Inc.*, 50 F.3d 1041,

1064, n.6 (D.C. Cir. 1995).[13] The employer's conduct must thus be scrutinized against the "totality of the circumstances in which the bargaining took place." *NLRB v. Billion Motors*, 700 F.2d 454, 456 (8th Cir. 1983); *see also United Packinghouse v. NLRB*, 416 F.2d 1126, 1131 (D.C. Cir. 1969) (quoting *Warehousemen & Mail Order Emps. v. NLRB*, 302 F. 2d 865 (D.C. Cir. 1962) ("The facts going into a determination of good faith must be viewed as a whole—'there is no per se test of good faith' in bargaining.").

ALJ Anderson explicitly recognized that resolving whether the News-Press' refusal to accept certain Union proposals was done in bad-faith, "in this case, depends on evaluating the *entire* record of the relations between the parties. Without broader consideration, no determination on the failure to bargain allegations may be confidentially [sic] reached." Bd. Dec. 85 (emphasis added). On that point, the News-Press agrees.

The decision, however, hardly paints a fair picture of the "entire record of relations between the parties." *Id.* Rather than consider the actions of *both* parties as it should, *Altamil Corp.*, 227

[13] Certainly, "the duty to bargain in good faith does not prohibit an 'employer's adamant insistence on pro-management terms,' and 'neither side is required to agree to a proposal or make concessions.' Thus it will often be difficult to distinguish bad faith from mere good-faith 'adamant insistence' on favorable terms." *Brown* 50 F.3d at 1064, n.6.

N.L.R.B. 915, 916 (1977), the decision focuses myopically on the conduct of the News-Press, Bd. Dec. 83-88, filling out its caricature of the News-Press as a villainous employer with findings that it had committed other ULPs, *id.* at 88, which were themselves predicated in large part on the fact that it had been accused of other ULPs, *see, e.g.*, *id.* at 3, 58-60, 90. At the same time, the decision minimizes or simply ignores the repeated conduct of the Union and its members aimed at stripping the News-Press of its First Amendment freedoms, *id.* at 21-22—conduct this Court has determined to have poisoned the News-Press' attitude toward the Union generally, *Ampersand*, 702 F.3d at 59.

What's more, while the Board's decision recognizes that it must be mindful of the "*entire bargaining circumstances*," *id.* at 83 (emphasis added), it relied almost entirely on just *two* matters—the News-Press' perceived unwillingness to cede its position on management-rights and discipline[14] and the existence of other

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[14] The bad-faith bargaining charge was predicated on the News-Press' insistence on proposals regarding management rights, grievance and arbitration, union bulletin boards, and discipline and discharge. Bd. Dec. 83. Anderson found no bad faith as to the bulletin board negotiations, explicitly finding that the News-Press was willing to provide a bulletin board though negotiations ultimately broke down. *Id.* at 84.

The decision does not discuss the impact of the grievance and arbitration proposal at all; instead, it summarily holds that the proposal, along with others, established that the News-Press was

alleged ULPs, *id.* at 83-88. Neither is itself sufficient to find a violation of section 8(a)(5) , and in light of the Union's misconduct (described above) and the News-Press' "good" conduct throughout the course of bargaining, they are insufficient even when viewed together.

First, "'[i]t is not unlawful for an employer to propose and bargain concerning a broad management-rights clause.'" *Bridon Cordage, Inc.*, 329 N.L.R.B. at 264 (quoting *Comm'l Candy Vending Div.*, 294 N.L.R.B. 908, 909 (1989)). Indeed, the Supreme Court has held that an employer's bargaining for a strong management-functions clause is not an unfair labor practice per se. *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 409 (1952). To be sure, such a position may suggest a party is coming to the table predetermined not to reach agreement, but it is rarely itself sufficient to establish it did—"especially if, as negotiations progress, the employer is willing to make 'the exercise of management-rights subject to the express terms of the contract.…"*Bridon Cordage, Inc.*, 329 N.L.R.B. at 264 (quoting *Am. Comm'l Lines*, 291 N.L.R.B. 1066, 1079 (1988)).

"wedded to regaining control over decision making" by inducing the Union to waive its rights of representation. *See id.* at 83-87. This was an odd conclusion considering that before organization, the company had no procedures at all for the airing and resolution of grievances. Tr. 2575; R. Ex. 407.

Here, the News-Press proposed a clause allowing certain rights to be subject to the express terms of the contract—expressly limiting the reach of the management-rights proposal and contracting bargaining power to the Union. G.C. Ex. 303. Though no such limiting terms had yet been adopted, the parties were in the midst of negotiations and neither had declared impasse when the ULP was filed. Bd. Dec. 87-88. Their absence says more about the status of negotiations than the subjective intent of the News-Press. Consider also that the paper expressly agreed to remove the "no-strike clause" in a showing of good faith as the parties continued to negotiate proposals regarding management rights, discipline, and arbitration. Bd. Dec. 80, 88; G.C. Ex. 362; Tr. 2577-78. Certainly the economic threat of strike would encourage the News-Press to reconsider any controversial application of the management-rights or discipline clauses. In short, agreement to News-Press' broad management-rights clause would *not* leave its employees with "fewer rights and less protection than provided by law without a contract." Bd. Dec. 85 (quoting *Pub. Serv. Co. of Okla.*, 334 N.L.R.B. 487, 488-89 (2001), *enfd.*, 318 F.3d 1173 (10th Cir. 2003)). The News-Press' hard bargaining on the issue does not evidence bad faith.

Second, while "[u]nlawful conduct outside negotiations can '[support] an *inference* that [a party] failed to bargain in good faith,' ... by 'establishing an intent ... to frustrate agreement,'" *Bridon Cordage*, 329 N.L.R.B. at 265 (quoting *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1382 (8th Cir. 1993), and *Genstar Stone Prods.*, 317 N.L.R.B. 1293, 1293 (1995)) (emphasis added), "unlawful conduct away from the bargaining table *does not determine conclusively* that bargaining had been conducted in bad faith," *id.* (citing *Hostar Marine Trans. Sys.*, 298 N.L.R.B. 188, 197 (1990)) (emphasis added).[15] And where, as here, each alleged charge should have been dismissed (as described above), their mere existence provides no evidence of bad faith at all. To the extent the decision relies on the "violations" of the Act described in ALJ Kocol's 2007 opinion to round out its bad-faith bargaining analysis, Bd. Dec. 90, the reasoning cannot stand. For this Court vacated that decision in 2012, finding that the News-Press' conduct during that "tainted" period was lawful.

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[15] *Bridon* correctly notes that a charge of bad-faith bargaining has not been supported by such ULPs as a unilateral change, *L.W. LeFort Co.*, 290 N.L.R.B. 344, 345 (1988), *Brown-Graves Lumber Co.*, 300 N.L.R.B. 640, 641-42 (1990), *Litton Microwave Cooking Prods.*, 300 N.L.R.B. 324, 331 (1990), direct dealing with employees, *River City Mech.*, 289 N.L.R.B. 1503, 1505 (1988), or a delay in providing requested *relevant* information, *Days Hotel of Southfield*, 306 N.L.R.B. 949, n.2 (1992). *Bridon Cordage*, 329 N.L.R.B. at 265.

Finally, a "party's overall approach to the negotiating process" is relevant "to determine whether bad-faith bargaining has occurred." *Bridon Cordage*, 329 N.L.R.B. at 265. Such factors include, for example, a party's willingness to meet at "reasonable times and places" and their penchant for "obstreperous conduct" at bargaining sessions. *Id.* (citing *Genstar*, 317 N.L.R.B. at 1293, and . *Radisson*, 987 F.2d at 1382). Here, the ALJ rightly found that the News-Press had not engaged in misconduct indicative of bad-faith apart from that described above—but that express finding seemed to carry almost no weight in the Board's analysis. Bd. Dec. 87-88.

By the time of the hearing, the parties had met 27 times since the inaugural meeting. Tr. 1938. In an effort to reach agreement, the News-Press agreed to the assistance of a professional mediator. G.C. Ex. 54. During bargaining, the News-Press submitted nearly 50 written counter-proposals to the Union, regularly describing the News-Press' position and, when appropriate, the particular reasons the company rejected a proposal. G.C. Exs. 301-06, 308-21, 325-26, 331-32, 334-40, 361-63, 369-72, 378, 383, 393, 395, 401, 413, 417, 424, 440.

What's more, the parties had reached tentative agreement on at least 16 issues (G.C. Ex. 442), including proposals regarding disability (G.C. Ex. 310-11), sick leave (G.C. Ex. 431), and full-time

status (G.C. Ex. 435), illustrating that the News-Press had not engaged in the disfavored practice of "fragmented bargaining," holding other terms hostage to negotiations regarding its insisted-upon proposals. *See Bridon Cordage*, 329 N.L.R.B. at 265. And there was no evidence the News-Press was disruptive at the bargaining table. Indeed, the Board decision found that:

> [T]he parties did not engage in improper bargaining in matters not discussed herein. Although each party viewed the others [sic] actions and conduct regarding certain procedural matters with alarm, I found that the conduct at the table was not wrongfully abusive or noncooperative, that the parties [sic] agreement and occasional disagreement on dates, times, and places for bargaining was not improper, and that the procedural aspects of bargaining were not improper.

Bd. Dec. 88. In short, the News-Press' conduct had all the indicia that the company came to the table with one goal—to come to terms with the Union.

Considering the totality of the circumstances—including the improper goals advanced by the Union, the ability of the parties to agree to various other proposals, and the absence of disruptive conduct by the News-Press during bargaining sessions—the paper's hard bargaining and the existence of other alleged ULPs simply cannot support a finding that the paper bargained in bad faith. This conclusion becomes even clearer in light of the fact that the News-Press held fast to its proposals out of its sincerely held belief that

without a broad management-rights clause, the Union would exploit its position to advance its stated goal of undermining the News-Press' First Amendment rights. For these reasons, the Board's conclusion that the News-Press bargained in bad faith cannot stand, and the Board's affirmative orders aimed at remedying that "violation" (namely, the extension of the certification year and the award of negotiation costs) must be vacated.[16]

CONCLUSION

For the foregoing reasons, the News-Press respectfully requests that this Court grant its Petition for Review, vacate the Board's decision and order, and deny the Board's cross-application for enforcement.

Further, because the Board has demonstrated a surprising disregard for the decisions of three federal courts—including this one—in its dogged pursuit of alleged ULPs stemming from the News-Press' attempts to safeguard its First Amendment rights, the News-Press asks this Court to issue an order enjoining the filing of charges by the Board against the News-Press unless and until the

[16] Even if this Court sustains the Board's decision regarding bad-faith bargaining, the News-Press contends that the record cannot support the exceptional, affirmative remedies imposed in this case (i.e., extension of the certification year, reimbursement of negotiation costs, and broad cease and desist order). Bd. Dec. 3-6; *Ampersand Publ'g*, 359 N.L.R.B. No. 127, 3-4.

Union can establish that a majority of its members no longer support the improper purpose that drove its formation and undoubtedly influenced the Union vote. Short of that relief, the only option for the News-Press is to surrender its First Amendment rights to the Union, which has demonstrated it will continuously file ULP charges if it does not, or risk bankruptcy. Indeed, with 26 dubious ULP charges against the News-Press pending before various tribunals and at least 19 others having been dismissed or otherwise resolved, the News-Press has been forced to defend itself on several fronts for nearly a decade, incurring *millions of dollars* in legal costs—all because it dared to resist the unlawful demands that it surrender control of the paper's content. The threat to the First Amendment rights of the press should the Union and the Board be permitted to continue their attacks on the paper could not be more clear.

Date: May 16, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B), and expanded in this Court's March 31, 2016 Scheduling Order, because it contains 16,765 words, exclusive of those parts of the brief exempted by Rule 32(a)(7)(B)(iii).

The foregoing brief also complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Bookman Old Style font.

Date: May 16, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2016, an electronic PDF of Petitioner's Opening Brief was uploaded to the Court's CM/ECF system, which will send notice of filing to counsel for all participants in the case who are registered CM/ECF users:

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Addendum of Constitutional and Statutory Provisions

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U.S. Const., amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

29 U.S.C. § 157

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor

organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158(a)(1)

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

Provided

, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:

Provided further

, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(1) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 158(a)(3)

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

29 U.S.C. § 158(a)(5)

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(4) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 158(c)

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(d)

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an

intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

29 U.S.C. § 160(a)

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting

commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

29 U.S.C. § 160(b)

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

29 U.S.C. § 160(c)

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear

argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

29 U.S.C. § 160(e)

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the

court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

29 U.S.C. § 160(f)

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such

petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

29 U.S.C. § 160(j)

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Addendum of Unpublished Decisions

2006 WL 1895044 (N.L.R.B. Div. of Judges)

National Labor Relations Board

Division of Judges

New York Branch Office

VINCCI USA, LLC D/B/A THE AVALON
AND
LOCAL 758, HOTEL & ALLIED SERVICES UNION, SEIU

Case Nos. 2-CA-36910
JD(NY)-30-06
New York, NY
July 6, 2006

Susannah Z. Ringel, Esq. New York, NY for the General Counsel,
Brian C. Dunning and Jonathan A. Wexler, Esqs. (Vedder, Price, Kaufman & Kammholz, P.C.), New York, NY for the Respondent
Kent Y. Hirozawa, Esq. (Gladstein, Reif & Meginniss, LLP) New York, NY for the Charging Party

DECISION

Statement of the Case

MINDY E. LANDOW, Administrative Law Judge. Based upon a charge, first amended charge and second amended charge filed on March 31, May 27 and July 29, 2005 [1] respectively, in Case No. 2-CA-36910, and a charge and first amended charge filed on November 18 and December 13, respectively, in Case No. 2-CA-37349, by Local 758, Hotel & Allied Services Union, SEIU, herein the Union, a complaint issued against Hotel Stanford LLC, d/b/a The Avaion (herein Stanford) and its successor Vincci USA, LLC d/b/a, The Avalon (herein Vincci or Respondent) alleging violations of Section 8(a)(1)(3) and (5) of the Act. On February 22, 2006, the Regional Director, Region 2 issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (the complaint) as well as an Order Approving Withdrawal of Certain Allegations of the Charge and Dismissing Corresponding Complaint (the Order). [2]

The complaint, as amended at hearing, [3] alleges essentially that Respondent violated Section 8(a)(1) and (5) of the Act by failing to recognize and bargain in good faith with the Union, by failing and refusing to furnish the Union with information requested which is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of certain of Respondent's employees and by making certain unilateral changes: (1) decreasing employees' personal days off from three to two per year; (2) increasing the work load and changing duties of employees in the Housekeeping Department and (3) eliminating the accrued seniority of employees which had been used for determining priority for time off and scheduling of employee work shifts. Respondent filed an answer on March 8 and an amended answer on March 22, 2006 denying the material allegations of the complaint. On March 29, 30 and 31, 2006, a hearing was held before me in New York, New York.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel and Respondent, I make the following

Findings of Fact

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I. Jurisdiction

Respondent has since July 1, 2005 operated a hotel facility located at 16 East 32nd Street, New York, New York (the Hotel). Respondent admits that, based upon a projection of its business operations since about July 1, 2005, Respondent will annually derive gross revenues in excess of $500,000 and annually purchase and receive goods and materials in excess of $5,000 directly from suppliers located outside the State of New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization Status

As discussed in further detail below, the record establishes, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act. [4]

III. Alleged Unfair Labor Practices

Background

In May 2004, the Union was certified as the exclusive bargaining representatives of two units at the facility involved herein (the Hotel). One unit, involving employees of Hotel Stanford LLC d/b/a The Avalon (Stanford) consisted generally of full and part-time maintenance and front desk employees. The second, which involved employees of K&H Management Corp. (K&H), consisted of full and part-time housekeeping employees. In late 2004, K&H ceased all business operations and in about January 2005, Stanford hired all the housekeeping employees formerly employed by K&H. Thereafter, on June 3, 2005, The Regional Director of Region 2 issued a Decision and Clarification of Bargaining Unit which merged the two units into the following unit: All full-time and regular part-time service and maintenance employees including front desk employees, guest service managers, night auditors, bell staff, maintenance workers, housekeeping workers, housemen, laundry workers, minibar attendants and room attendants employed by the Employer at its facility located at 16 East 32nd Street, New York, New York, excluding all other employees, including office clerical employees, managerial employees and guards, professional employees and supervisors as defined by the Act.

It appears that no collective bargaining agreement was ever reached between the Union and Stanford.

Initial Union Contacts with the Prospective Owner

Fernando Montalvo has been the Managing Director of Respondent since it assumed operation of the Hotel. He is the highest-ranking on-site manager responsible for supervising employees through their respective department managers. Montalvo testified that he first arrived at the facility on June 6, and that he recalled Union organizer Neil Diaz presenting himself at the Hotel a few days before Vincci assumed operations. He additionally testified, however, that he first learned that a labor organization represented employees at the Hotel sometime later, during the fall of 2005, when attorney Brian Dunning so advised him. [5] The testimony of Diaz is at odds with this account.

According to Diaz, during the summer of 2004, rumors began to circulate that the hotel was going to be sold. Subsequently, sometime during the third week of January 2005, he received a telephone call from an employee advising him that a representative from the potential new owner was at the hotel. Diaz went to the hotel, bringing information regarding the Union and outstanding unfair labor practice charges which had been filed with the Board. Diaz saw someone emerge from the lobby conference room, who he surmised was related to the new owner, and approached him explained that he was from the Union. This individual introduced himself as Carlos Rentero, [6] who, as the record establishes, is Respondent's Revenue Manager. Rentero, who is primarily situated in Spain, shares authority concerning the operation of the Hotel with Montalvo. [7]

Rentero invited Diaz into the conference room and, because he stated that his ability to converse in English was limited, the two spoke in Spanish. Diaz told Rentero that the Union had organized the employees at the Hotel and that the Union had filed unfair labor practice charges against the employer. A few minutes later, Hwang, one of the owners of the Hotel under Stanford, walked into the room and the discussion ended. Diaz had no further contacts with any representative of the prospective owners for some months after this initial meeting.

In late-June, Diaz learned that management had scheduled a meeting for its employees. On June 28, Diaz went to the Hotel and introduced himself to Montalvo, asking him if he was the new owner. Montalvo replied that he was not. Diaz asked who the new owner was, and Montalvo told him to call his attorney. Diaz asked Montalvo some additional questions, but Montalvo replied only that Diaz should call his attorney. At that time, Diaz advised Montalvo that the Union represented employees in the facility and they had been trying to get a collective bargaining agreement with the employer. He also stated that he expected the new owners to sit down and negotiate with the Union when they took over the Hotel.

On the following day, June 29, Diaz had another conversation with Montalvo in the lobby of the hotel. He handed him a packet of information regarding the unfair labor practice charges that had been pending before the Board, as well as other documents including a fire safety letter, and recommended that Montalvo speak with his attorney about the documents. He then proceeded to Stanford General Manager Marcio Azevedo's office. [8]

Vincci Assumes Operations of the Hotel

As of July 1, Respondent assumed operations at the Avalon, and hired virtually all the employees who had worked for Stanford, including those in the unit set forth above. Respondent admits that in assuming operations of the Hotel, it became a successor to Stanford. The former Stanford General Manager, Azevedo, remained on staff for approximately two several months to assist Montalvo with the transition. Henry Castillo is the Hotel's accountant. Carlos Calero is the C.E.O. of Vincci Hotels and his brother Rafino Calero is the President.

On June 29, [9] all employees were summoned to a meeting where the change in Hotel ownership was announced. Hwang spoke first, thanking employees for their service and introducing the new proprietors. Those present at the time included Carlos Calero, Rentero, Montalvo and Castillo. Also attending were Bozena Mroziewska, who was then the Housekeeping Department Manager, as well as Danuta Keilszewska, who subsequently assumed that position.

The Vincci principals who spoke at this meeting did so in Spanish, with Montalvo translating their comments into English. Calero introduced himself as President of the Hotel, and presented the others. He told employees that the Avalon was their first hotel in the United States, and said that employees and management would learn from each other. After his initial comments, Rentero conducted the meeting from that point onward, telling employees about the company and showing computer-projected slide photographs of other Vincci properties located abroad. According to witnesses who testified for the General Counsel, Ruth Ibarra, Trifinia Joaquin and Ania Cabrera, employees were told, in essence, that things would remain the same as they had been under the prior owner. It was also announced that all employees would have the opportunity to interview and they were all invited to fill out an application for employment.

Montalvo testified that, at this meeting, employees were advised of the opportunity to interview and complete an application, and that employees were told that the company had the intention of hiring as many people as they could. He also testified, however, that employees were told that "everyone will be starting from scratch since July 1st" Montalvo did not identify which Vincci representative made that statement, but confirmed that both Calero and Rentero spoke at the meeting. Montalvo testified that it was his understanding that this phrase meant that "all the seniority will start from July 1st, that everyone was going to be hired July 1st and everyone was going to be actually with the new company on July 1st. That whatever happened before we understood wasn't relevant for the new company." Montalvo did not testify, however, that this "understanding" was

communicated to employees in so many words: rather, he repeatedly used the phrase "starting from scratch" to describe what was imparted to employees.

Montalvo was asked whether employees asked questions at the meeting. He recalled that one employee, who he could not identify, asked about seniority. The response to this question was that everything was "starting from scratch from the beginning, like a new company and new opportunities for everyone."

Carmen Garcia, who has worked at the Hotel since September 1998, is currently employed by Respondent as Front Desk Manager. At the time of the June 29 meeting, she was a Front Desk Agent. [10] Garcia testified that she attended the meeting, and that after Rentero introduced the company and showed pictures of other properties, employees started to ask questions. Employees were told that they would be receiving an application to complete and meeting with a representative of Vincci for an interview. According to Garcia, someone sitting behind her, who she could not identify, asked about seniority, and Rentero said that everyone would be starting from July 1. Garcia said that upon hearing this, her heart started beating a little, but she was comfortable with it since it was time for a new company and for things to change.

Garcia testified that after the meeting she had a discussion with fellow Front Desk employees Nancy Namieze and Ania Cabrera. They were online, looking at various Vincci properties. The three were nervous about the upcoming interview and they spoke about losing their seniority. Garcia testified that Cabrera said to her, "You see, you lost all your seniority." Garcia testified that she just looked at Cabrera and smiled, because seniority was not a big issue for her. [11] Cabrera, who is no longer employed by Respondent, was called by Counsel for the General Counsel for rebuttal testimony, and denied that she had ever had such a conversation with Garcia. [12] In addition, Ibarra and Joaquin testified, on rebuttal, that there had been no discussion of seniority or scheduling at the meeting, and that the employees did not speak or ask questions at the time. [13]

Housekeeping employee Fabiola Coronel also testified on behalf of Respondent. Coronel recalled that Hwang made some initial comments, that a slide presentation was shown to employees and that Montalvo and Rentero were present. When asked if she remembered anything that was said, Coronel replied "[t]hey said that all of us were going to start as new. There were going to be small changes. And that all of us were going to start the same day, the July 1 st , and we all were the same." Coronel could not recall who made the above statement, or whether employees asked questions. [14] When specifically asked by counsel for Respondent whether any of the Vincci representatives talked about seniority rights, Coronel replied "I think at that meeting nothing like that was mentioned." [15] Coronel further testified that she later attended meetings of the housekeeping staff, where Montalvo was present, and the issue of seniority came up on several occasions. Montalvo told the staff that there was no seniority for anyone, because they had all started as new employees.

After the meeting, employees met with Vincci representatives and were provided with employment applications to complete. Ibarra, a housekeeping employee, was interviewed by Montalvo and someone from Respondent's human resources department. Montalvo introduced himself and asked Ibarra what, in her opinion, should be changed in the Hotel. Ibarra replied that there were many things which should be changed, and specifically mentioned that the floor rugs should be replaced and that employees needed uniforms. During this discussion, Ibarra asked Montalvo whether her seniority would change, and Montalvo replied "possibly," because he did not know who she was or how she worked. Ibarra was given an application, which she completed and returned the following day. Ibarra's testimony on these issues is unrebutted.

Joaquin, who is also a housekeeping employee, was interviewed by Rentero, who asked her how long she had worked at the Hotel, and what her job was. He too, asked what changes should be made to improve the Hotel, and Joaquin testified that the facility needed additional sheets and towels. Rentero said that her salary would improve and told Joaquin that from that point on she was an employee of Vincci. She was given an employment application to complete, which she later did, and returned to Montalvo.

Cabrera, a former Front Desk agent, was interviewed by Rentero the day following the meeting. She testified that she was told that her schedule would remain the same and there would be no changes. There was no discussion of seniority during this interview. Cabrera additionally testified that, in addition to the meeting attended by all employees, a subsequent meeting for front desk employees was conducted by Montalvo and Azevedo. Employees were told that they would keep the same schedule and there would be no changes.

Room Attendant Dominga Martinez was never interviewed by a representative of the new Hotel ownership. Azevedo provided her with an application packet, which she completed and signed on July 4 and returned to her supervisor.

The application packet distributed to employees contains several sections. It includes an organizational chart of the Vincci organization, a list of "quality standards" that employees are expected to adhere to [16] as well as the application form itself which asks for personal data and information regarding the employee's education and employment history. In addition, there is an attachment describing certain employment policies. The enumerated policies pertain to sick leave, dress code, discipline, attendance, and harassment. The application packets in evidence show that employees signed each page thereof. There is no reference in the application form or any attached document to seniority, scheduling or to personal days or other paid time off.

All but a few of the predecessor's employees were hired by Vincci. There was no hiatus in Hotel operations.

The Union's Demands for Information and Bargaining

On July 19, Diaz wrote to Elias Eliopoulos and Michael P. Mangan, attorneys that, as he understood, were representing the Respondent. In this letter, Diaz described the certified bargaining unit, requested to meet for the commencement of negotiations to reach a collective bargaining agreement and requested certain information which, Diaz explained in the letter, was necessary for the Union to represent employees effectively in negotiations. The information sought was as follows:
The complete names and addresses of all persons or entities that hold an ownership interest in the hotel.

Name, address, telephone number, job classification, date of hire, date of completion of any probationary period, and all records of discipline, for all bargaining unit employees.

Payroll records and IRS Form W-2 for all bargaining unit employees for the period from July 1, 2004 to the present.

As to each bargaining unit employee, records that show the date and amount of each wage increase received by the employee on or after January 1, 2004 and the resulting wage rates.

Records that show the number of regular and overtime hours worked by each bargaining unit employee during each week of the period from July 1, 2004 to the present.

For each bargaining unit employee, records that show the number of paid sick days received by the employee for 2004, and the number of such days to which the employee is entitled in 2005.

For each bargaining unit employee, records that show the number of paid vacation days received by the employee for 2004, and the number of such days to which the employee is entitled in 2005.

For each bargaining unit employee, records that show the number of paid holidays received by the employee for 2004, and the number of such days to which the employee is entitled in 2005.

Records that show (a) the types of medical coverage available to bargaining unit employees, such as individual coverage, family coverage, parent/child coverage, etc., (b) the number of bargaining unit employees enrolled in each type of coverage, (c) the

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monthly or weekly cost to an employee for each type of coverage, and (d) the monthly amount charged by the Employer for COBRA continuation coverage for each type of coverage.

Copies of the plan documents, summary plan descriptions and insurance contracts and endorsements for all employee benefit plans that cover or covered a bargaining unit employee at any time during the period from January 1, 2004 to the present.

Copies of all documents that describe or explain policies or practices concerning wages, hours, benefits, work rules, and/or other terms or conditions of employment of bargaining unit employees that have been in effect at any time since January 2004, including but not limited to handbooks, manuals, policy statements, memoranda and correspondence.

Copies of all current job descriptions.

A copy of this letter was sent to Montalvo, who under questioning by the General Counsel, admitted that he received the letter. [17] Although Mangan left Diaz a voice mail message a few days later, Diaz was subsequently unable to reach him, and he failed to return Diaz's phone calls.

On July 25, the Union erected an inflatable rat and began holding ongoing rallies in front of the Hotel each weekday from noon to 6:00 p.m. On the first day this occurred, Azevedo approached Diaz and asked why the Union was doing this, instead of speaking with the attorneys. Diaz replied that he had not received any response to his letter. During their discussion, Azevedo informed Diaz that Eliopoulos and Mangan were not representing the Hotel, and that the attorney doing so was David Rothfeld. Diaz replied that the Union would not take down the rat, and that he was expecting the General Manger of the Hotel to call the Union to start negotiations. During the course of the day, Diaz saw Montalvo coming out of the building. Diaz approached Montalvo and asked when he was going to start negotiations, but was ignored.

On July 29, Diaz made a second request for bargaining and information, identical to the first, but this time it was sent to Rothfeld. He received a response, dated August 12, the body of which states:
Together with our client we have been working on compiling information responsive to your requests for information, subject to any rights or defenses we may have. With specific respect to your request to bargain, and as same is relevant to the context of your information request, please provide me with a copy of Local 758's Certificate as Collective Bargaining Representative for the Vincci Avalon.

Diaz referred the letter to Union attorney Kent Hirozawa, who responded on August 18, enclosing the relevant certifications and the Decision and Clarification of Bargaining Unit creating the single wall-to-wall service and maintenance unit.

Prior to receiving Rothfeld's response, on August 4, Diaz visited the hotel, proceeding to Montalvo's office, located in the basement. He asked Montalvo, in the presence of Castillo and three other employees, when the Hotel was going to start negotiations. Montalvo again told him to contact his attorney. Diaz stated that he had received no response from his attorneys, and suggested that Montalvo contact Local President John Hickey. Castillo told Montalvo to leave the premises. Diaz asked for the name of someone the Union could contact at the Hotel, and Montalvo repeated that Diaz should call his attorney, and Castillo again told him to leave. Diaz proceeded to the cafeteria, where employees were having lunch, to speak with them. As he came out of the cafeteria, Diaz was confronted by Montalvo and Castillo who said he could not come into the premises without announcing himself and threatened to call the police if he did not leave. Diaz stated that he would be coming in every day if the Hotel did not start negotiations. The three men proceeded to the lobby, and Montalvo called the police, at which point Diaz left the facility. The following day, Diaz returned to the facility. In the lobby he was confronted by Montalvo who insisted he leave the premises, which he did. During this general period of time, Diaz made additional attempts to contact Hotel representatives. He also sent pictures of the inflatable rat and employee rally, together with copies of leaflets and unfair labor

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practice charges, to Vincci hotel properties abroad. On August 17, Diaz saw Montalvo walking by the rally in front of the Hotel and asked Montalvo when he would call the Union and when they would start negotiating. Montalvo ignored him.

On October 26, Union attorney Kent Hirozawa received a telephone call from Brian Dunning, who introduced himself and said that he had recently been retained as counsel for Vincci. Dunning said that they were still in the process of figuring out what was going on with the Hotel, and proposed a meeting. Hirozawa replied that the Union had been demanding bargaining for some time, and Dunning replied that it was premature to talk about negotiations, but that a meeting would be useful. A meeting was scheduled for November 1. Later that day, Dunning called Hirozawa and said that it had been premature to set up a meeting. Hirozawa asked when he would be in a position to do so, and Dunning replied that he needed to have some more discussion with his client and would let Hirozawa know when that time came.

On November 18, Vincci C.E.O. Carlos Calero visited the Hotel. The Union had been staging a rally, and there was a crowd present, carrying signs which bore slogans such as “sign the contract.” Calero continued into the hotel, and subsequently the police arrived, but did not disturb the rally. During that ensuing week, Diaz left messages at the hotel desk, seeking a meeting with Calero. On November 23, Montalvo came outside and told Diaz that Calero wanted to meet with him. The three men proceeded to a second floor banquet room. Calero told Diaz that he was in New York to fix the problems with the Hotel, talk to the Union and see what could be done. He stated that the company's hotels in Spain were unionized, and he had no problem with the Union. He asked Diaz to take the rat down. Diaz replied that if the parties started negotiations, and things looked good, he would speak to the Union president about doing so. Calero stated he would contact his attorney about setting up negotiations. Diaz stated that he would take the rat down for the rest of the week, until the parties sat down with each other, and what would happen in the future depended on what happened during negotiations. [18]

On November 23, Dunning contacted Hirozawa about setting up a meeting similar in concept to what had been initially planned for November 1. A meeting was set for the following Monday, November 28, and took place as scheduled. Dunning and his partner, Jonathan Wexler, met with Hirozawa and Diaz in Dunning's office. Dunning asked questions about the Union and the parties generally discussed the hotel industry in New York City. Dunning requested that the Union suspend picketing at the Hotel while the parties were making arrangements to meet and meeting. Hirozawa replied that he did not think the Union would do that as the Hotel had reneged on its obligation to meet and bargain since July. Hirozawa further stated that if the Union believed that the parties were under way to an acceptable contract, it would cease picketing. Hirozawa also stated that it would be helpful if the Hotel would rescind the change that had been made regarding the denial of accrued seniority to employees [19] and reinstate those employees that had been terminated when Vincci took over.

The parties generally discussed their schedules in the upcoming few weeks, and there was talk of possibly scheduling a meeting when Carlos Calero, who had returned to Spain, would be in town. Dunning stated that he would contact Hirozawa once he determined his client's schedule. He also requested copies of the multi-employer agreement that the Union has with certain hotels New York City as well as the Stanford agreement. Although Hirozawa believed that Respondent already had copies of such agreements, he agreed to send them to Respondent, which he did later that day.

Subsequently, on December 2, Dunning wrote to Hirozawa, expressing disappointment that the Union had not agreed to cease picketing, and complaining about disruptive activity he claimed the Union had engaged in at the Hotel. Hirozawa responded by letter dated December 6 in which he denied any disruptive activity and reiterated the Union's position that it would consider the cessation of picketing when the Union was satisfied that Respondent was committing to reaching a contract with the Union on acceptable terms. Dunning and Hirozawa also had a series of voice and e-mail communications regarding potential meeting dates, and a negotiation session was scheduled for December 19.

The parties met on December 19 in Dunning's office. Montalvo and Castillo were accompanied by attorneys Dunning and Wexler, with Diaz and Hirozawa present for the Union. The parties discussed the structure of the bargaining. Hirozawa stated that if it was acceptable to the Hotel, the parties could work off the Master Agreement, with particular accommodations for the Hotel, as had been done with the Stanford agreement. In the alternative, the parties could bargain a new agreement from scratch,

and the Union would be happy to provide a proposal if that was the approach the Hotel preferred. Most of the meeting was spent answering the Hotel's questions about the two collective bargaining agreements, and how particular terms were applied. There was also some discussion of job classifications, wages, seniority and arbitration. Dunning stated that the company would review the information and put together a proposal. Another meeting was scheduled for January 3, at which time this proposal was to be discussed.

Respondent later cancelled that meeting.[20] Hirozawa and Dunning spoke on January 3, and Dunning said that he had not been able to get a proposal together, but that he would have a good idea of when it would be completed by the end of the week. Dunning stated that he would call and advise Hirozawa when the proposal would be ready, and then the parties would be in a position to schedule a meeting. Dunning also stated that Respondent would send the Union the proposal in advance of the meeting. Hirozawa did not hear anything for the balance of that week. On Monday, January 9 he telephoned Dunning who was not available. He left a voice mail message, but did not get a response for several weeks. On February 6 the parties finally spoke. Dunning told Hirozawa that it had been more difficult than anticipated, and he did not have a proposal yet. He stated that he would be traveling to Spain, that people from Spain would be traveling here and he would have to check on dates and availability.

Later in the week, Dunning contacted Hirozawa and informed him that his client was coming over from Spain the following week, and proposed a meeting on February 17. The parties agreed to meet on that day at 2:00 p.m. at Dunning's office.[21] Present on this occasion were Dunning, Wexler, Montalvo, Castillo, Rentero, Diaz and Hirozawa. Dunning stated that there had been no time to reduce anything to writing, but presented oral proposals relating to wages, pension, seniority, holidays, vacation, room quotas and sick leave. The parties caucused, and Hirozawa stated that to properly evaluate and respond to these proposals the Union required the information that had been requested back in July and which had not been provided. Wexler asked for copies of the original information request and copies of the Pension Fund and Benefit Fund trust agreements, which Hirozawa sent, via e-mail, later that day.

On March 10, Dunning sent Hirozawa an ADP master control list, for the pay period ending February 24, which contains a list of employees and their addresses. Counsel then exchanged a series of e-mails. On March 15, Hirozawa acknowledged receipt of the document, and inquired about when the rest of the information would be coming and when the employer would be prepared to present a comprehensive proposal. On March 16, Dunning replied that it was his understanding that the Union was supposed to be reviewing the economic terms of the last offer. On March 23, Hirozawa reiterated that the Union could not properly evaluate the proposals without the information that it had requested the previous July.[22] Hirozawa also requested that the Respondent provide the Union with a comprehensive proposal. To date, no further meetings have been scheduled. Hirozawa testified that the information that the Union requested in July 2005 is essential to enable the Union to respond to and formulate bargaining proposals.

The Alleged Unilateral Changes

The complaint alleges that Respondent implemented a number of unilateral changes without notice to or bargaining with the Union. These include (1) the elimination of accrued seniority which had been used for, among other things, determining priority for time off and scheduling; (2) an increased work load and changed duties for employees in Housekeeping Department and (3) a decrease in employee personal days from three to two.

The Alleged Elimination of Accrued Seniority

Ibarra testified that in mid-November a meeting of all the housekeeping employees was held in the cafeteria with Azevedo, Castillo, Montalvo, Mroziewska and Keilszewska.[23] Ibarra arrived late for the meeting, and when she arrived a discussion was underway about how there would be no more seniority, and that everyone would be considered to have started work as of July 1. Montalvo announced that personnel would start rotating days off. Ibarra had previously worked a regular schedule, Monday to Friday, having Saturday and Sunday off. After this announcement, her days off changed from week to week, and

she did not know what days off she would receive until the schedule for the following week was posted. At times her days off are consecutive and at other times they are not. On occasion, she is scheduled to work for six to eight successive days prior to receiving a day off. Ibarra's testimony was corroborated in large measure by Joaquin. Prior to November 2005, Joaquin worked Monday to Friday. Since November, her days off have changed from week to week. Like Ibarra, Joaquin does not know what her schedule will be until it is posted. Housekeeping employee Martinez testified that, although she was not at the November 2005 meeting, she heard about the change from the coworkers. Previously she had Thursday and Friday of each week off and like the others, she now has varying days off from week to week.

With regard to this issue, Montalvo testified that he conducts monthly meetings with the housekeeping staff, and the seniority issue has come up on several occasions. On each occasion, it has been explained to employees that their seniority started on July 1. Montalvo also testified that in about mid-October, Coronel came to his office and asked why, if seniority for all employees began as of July 1, the scheduling wasn't done more fairly, and complained that certain days off were consistently assigned to certain people, and not rotated among employees. Montalvo replied that he didn't understand why the scheduling was being done in that fashion and, if the scheduling was not reflecting the seniority rules fairly, he would have a meeting with the employees and inform them that this was something that had been done wrong, and would be changed.

Montalvo testified that he subsequently attended a meeting of housekeeping employees where he “informed everyone that as we mentioned when we took over the property about seniority, that everyone was hired on July 1 st and everyone was starting from scratch. So seniority for all of them should be the same, so the scheduling will be rotated so everyone will be having weekends off and everyone will be having fair schedules and fair time off.”

Coronel testified that when the issue of seniority came up at monthly housekeeping department meetings, Montalvo stated that there was no seniority for anybody because they had all started as new employees. Coronel testified that she had a discussion about shifts and assignments with Montalvo, but that this came about because the schedules, as she put it “weren't steady.” According to Coronel, “I asked him if they were going to change at any moment and if we're going to have steady days. And he said that the Hotel - the schedules had to vary and you could not have a steady day off.”

The Alleged Unilateral Increase in Work Duties in the Housekeeping Department

Respondent's room attendants generally work during the hours from 8:00 a.m. to 4:00 p.m. They are each responsible for cleaning a minimum of ten rooms per day. Extra rooms may be assigned, as needed, for additional compensation. The room attendants' typical responsibilities include changing sheets on the beds, vacuuming floors and dusting furniture and table lamps. In addition to these customary duties, supplementary tasks known as “projects” would be listed in the far-right column of employees' daily assignment sheets, known as “maid's reports.” Joaquin testified that, “they always listed one or two daily projects besides the 10 rooms.” No other employee witness offered specific testimony regarding the frequency of these assignments. Thus, it would appear from the record that projects were dispensed on a daily basis.

Beginning in about October 2005, room attendants were no longer assigned projects but were told that they were expected to clean everything in their assigned rooms as well remove room service trays and clean the tables, paintings, mirrors and rugs in the common areas on the floors to which they were assigned. [24] General Counsel concedes that these tasks were among those previously assigned on the maid's reports. According to Joaquin, she had done all these jobs previously, but not as frequently as she does them now. In addition, it appears that certain tasks, including the removal of room service trays and cleaning the trash cans located at the elevator, may have previously been performed by other employees in the Housekeeping Department. In this regard, it appears from the testimony of the witnesses that certain employees are, at times, responsible for general cleaning duties rather than specific room assignments. For example, Martinez testified that for some period of time after she began working at the Hotel, she did not have an assigned floor but was responsible for general cleaning duties. The role of such employees in the overall functioning of the Housekeeping Department, both before and subsequent to the alleged unilateral changes, is not clear, however. Witnesses also made reference to classification of employee known as “houseman,” who shares the responsibility for

cleaning duties. There is a lack of specific evidence regarding how the duties of the houseman generally differed from those of room attendants under either Stanford or Respondent.

According to Ibarra, prior to the change in work duties she used to finish her daily tasks at about 3:00 or 3:15 p.m. and was able to use the balance of her time to stock up on supplies. After the change was announced, the time it took for her to complete her work was extended, and for some time she had to stock her supplies in the morning. Ibarra did not specify how much longer her new job tasks took her, however. In addition, it appears that this situation is now somewhat different, as Ibarra testified that for the past three or four weeks her supplies have been delivered to her by a houseman. Similarly, Martinez testified that the new work assignments change the time it takes her to do her job. Previously she finished work at 2:30 to 3:45, which gave her time to organize and leave everything clean. Now, she finishes her assigned tasks later in the day. Again, Martinez did not provide specific testimony about how much longer she has to work to complete her assignments.

On cross-examination the housekeeping employees who testified all acknowledged that their regular work hours have not changed, and their work has never required them to stay beyond 4:00 p.m. Martinez did testify that from time to time, employees "back up and we help ourselves between us so we can get finished earlier." However, no testimony was adduced as to whether this has historically been the case, or is a result of any alleged change in work assignments.

Respondent does not dispute that the housekeeping employees have assignments as described, but asserts that this has been the case since it assumed operations. According to Montalvo, each hallway contains two paintings, two small tables and two mirrors. Room Attendants were provided with a special extended-length duster to facilitate the cleaning of hanging lamps and the tops of armoires and are not required to move and clean behind furniture. This is done on a monthly basis by other employees.

The Alleged Change in the Number of Personal Days

Under prior ownership, employees were entitled to three paid personal days per year. According to Ibarra, in September 2005, Housekeeping Department Manager Mroziewska informed her and other employees that employees were now entitled to only two personal days per year, instead of three days as had been previously been allowed. [25] Joaquin testified that she has heard from her coworkers that the number of days has been reduced to two. Martinez testified that in October she needed to take a personal day. She spoke about the matter with, Mroziewska, who told her that employees were no longer entitled to three personal days. Mroziewska then called Castillo to verify how many days Martinez had left, and she was allowed to take the day.

Montalvo testified that under the previous ownership, employees were entitled to three personal days: one for their birthday, one for the anniversary of their date of hire and one other day to be taken at their discretion. He also stated, however, that he did not learn about this policy until after Respondent assumed operations. [26] According to Montalvo, no Hotel employee has been denied the right to take a third personal day. Montalvo did not testify, however, as to what Respondent's current policy is or whether it is in conformity with the prior practice. There is also no evidence that Respondent has rescinded its announcement of the change, as described by employees.

Analysis and Conclusions

Respondent's Duty to Bargain with the Union

The Board's traditional test for determining if a purchaser has a duty to continue the bargaining relationship established by its predecessor is whether there is a substantial continuity in the employing enterprise. A comparison of business operations, plant, work force, jobs, working conditions, supervisors, machinery, equipment, production methods and product or service is made to ascertain if continuity exists. *Fall River Dying Corp. v. NLRB,* 482 U.S. 27, 42-46 (1987). In the instant case, the evidence establishes, and Respondent has admitted, that it is a successor employer. Respondent continued providing the same service to its customers without any hiatus, at the same location and using the same supervisory and non-supervisory staff.

The record further establishes that on numerous occasions both before and after Respondent assumed operations of the Hotel, the Union made it well known to Respondent that it represented its employees. In this regard, Montalvo's testimony that he did not know that the Union represented the Hotel's employees until he was so advised by his attorney in the fall of 2005 cannot be worthy of credit. This fact clearly would have been ascertained in any pre-acquisition due diligence investigation. Moreover, not only was Montalvo party to several discussions to such effect with Diaz, [27] but he admittedly was in receipt of the Union's July 19th letter. Further, the record establishes that commencing in late-July, the Union erected an inflatable rat and began picketing at the Hotel due to Respondent's failure to meet and bargain over an agreement. I additionally note that Azevedo remained on staff to assist Montalvo with the transition. It is simply not credible that Azevedo would not have advised Montalvo about the Union's representation of employees at the Hotel, if he had not known of it previously. Under all these circumstances, I conclude that it would have been virtually impossible for Montalvo to remain unaware of the Union's status at the Hotel. [28]

The evidence is also clear that, after Respondent assumed operations of the Hotel, there was a viable demand for recognition and bargaining from the Union, on several occasions, and at the very latest, by July 29, when the Union's demand for bargaining and information was sent to its then counsel-of-record David Rothfeld.

Based upon the foregoing, the record establishes, and I find, that upon its assumption of operations at the Hotel, Respondent had a duty to bargain with the Union. *NLRB v. Burns Intern. Sec. Services, Inc.*, 406 U.S. 272 (1972).

Respondent's Refusal to Bargain in Good Faith

The complaint alleges that since its assumption of the Hotel, Respondent has refused to recognize and bargain in good faith with the Union by refusing to meet from July 1 thorough mid-December 2005, by failing to promptly schedule bargaining meetings and failing to offer counterproposals.

In *J.H. Rutter-Rex Mfg. Co.*, 86 NLRB 470, 506 (1949), the Board stated that the obligation to bargain
encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring. Agreement is stifled at its source if opportunity is not accorded for discussion or so delayed as to invite or prolong unrest or suspicion. It is not unreasonable to expect of a party to collective bargaining that he display a degree of diligence and promptness in arranging for collective-bargaining sessions when they are requested, and in the elimination of obstacles thereto, comparable to that which he would display in his other business affairs of importance.

See also *Calex Corp.*, 322 NLRB 977 (1997) ("considerations of personal convenience, including geographic or professional conflicts to not take precedence over the statutory demand that the bargaining process take place with expedition and regularity"); *Caribe Staple Co.*, 313 NLRB 977, 893 (1997); *Lancaster Nissan*, 344 NLRB No. 7, slip op at 3. (2005) (delay tactics resulting in only 12 meetings during the initial certification year held to violate Section 8(a)(5)).

The Board has held in numerous cases that a party who limits or delays meetings has not met its statutory obligation to meet and bargain, in violation of the Act. In *Calex Corp.*, supra, the fact that the employer met only three times in a three month period, and cancelled other scheduled meetings, was found to comprise "purposeful delay." Similarly, in *Caribe Staple*, supra, the respondent was found to have violated the Act where the parties met and bargained on average once per month over the course of a 13-month period, despite union requests for more frequent meetings.

In the instant case, the evidence demonstrates that the Union made repeated requests for bargaining, both in person and in writing, to Respondent's managerial personnel and counsel. For a period of some four months there were no meetings whatsoever during which time Respondent's counsel cancelled a meeting scheduled for November 1, with no specified alternative date. In fact, no face to face meeting was held until November 23. This meeting was in no sense a discussion of terms and conditions of employment, but rather was arranged by Carlos Calero with the object of convincing Diaz to remove the inflatable rat stationed in front of the Hotel. Thereafter, on November 28, a meeting was held, albeit with the caveat that it was not to commence

negotiations, but rather engage in a "pre-bargaining" discussion. A negotiation session, scheduled for December 19, was the first time the parties discussed, in any sort of substantive manner, terms and conditions of employment. I further note that a subsequent meeting was cancelled by Respondent. The parties did not meet again until almost two months later, on February 17, 2006. To date, no written proposals have been presented to the Union.

In its brief, Respondent argues that the parties have met on at least three occasions to bargain, and those meetings have included substantive and detailed discussions about wages, benefits and work rules. Therefore, it is argues, the General Counsel's claim is moot. [29] Respondent's argument, of course, fails to address its abject failure to meet with the Union in any manner whatsoever for a period of four months, the delay of some five months before any bargaining proposals were discussed, and its additional failure to timely schedule meetings with the Union, once it undertook to do so.

Based upon the foregoing, I find that by refusing to meet from July 1 thorough mid-December 2005 and by failing to promptly schedule bargaining meetings, Respondent has violated Section 8(a)(5) of the Act, as alleged. [30]

The Refusal to Provide Information

The complaint alleges that on or about July 19, by letter, the Union requested that the Respondent furnish it with certain information, which is set forth in full above. The complaint further alleges that such information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the employees and that Respondent, since July 19, has failed and refused to provide it.

The Respondent's answer admits that the Union requested the information, but denies that the information is necessary for, and relevant to, the Union's responsibilities as the collective-bargaining representative of the unit. Additionally, on the record and in its brief, Respondent acknowledges that it did not initially provide the documents sought to the Union, but asserts that the claim is now moot inasmuch as it did produce the vast majority of them in response to the General Counsel's subpoena duces tecum.

It is well established that an employer has an obligation to supply requested information which is reasonably necessary to the exclusive collective-bargaining representative's responsibilities. This duty to provide information includes information relevant to contract negotiations and administration. If the information is relevant or arguably relevant, meeting a liberal "discovery type standard," such information must be provided. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). Information which is presumptively relevant must be provided within a reasonable time or, if not provided, there must be a timely explanation of why the request cannot be met. *FMC Corp.*, 290 NLRB 483, 489 (1988). An unreasonable delay in furnishing requested information is, in and of itself, a violation of Section 8(a)(5) of the Act. *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989).

In general, the Union here requested data concerning the identity and status of unit employees, and information regarding wages, hours and other terms and conditions of employment of unit employees. Such information is presumptively relevant. *Maple View Manor*, 320 NLRB 1149, 1151 (1996). It is the employer's burden to prove any lack of relevance for information requested by a union which is presumptively relevant. *Contract Carriers Corp.*, 339 NLRB 851, 858 (2003). In this case, Respondent offers no evidence or argument pertaining to why such presumptively relevant information should not be provided to the Union, or any explanation of why it has failed to do so.

With regard to the Union's request for information regarding the ownership interests of Respondent, Counsel for the General Counsel concedes that such information has traditionally found not to be presumptively relevant. In support of its argument that such information should have been provided to the Union, General Counsel relies upon *Corson & Gruman Co.*, 278 NLRB 329, 334 (1986), enfd. 811 F.2d 1504 (4th Cir. 1987). In that case, which arose in a context where the requesting union believed that the signatory to its collective bargaining agreement was involved in an alter ego or single employer relationship with another entity, the administrative law judge, affirmed by the Board, held that regarding non-presumptively relevant information, "the requesting union need not inform [an employer] of the factual basis for its requests, but need only indicate the reason for its

request." Here, the Union initially told the Respondent that the information was needed in order to properly represent members in contract bargaining. During the hearing, Union counsel Hirozawa provided a more detailed rationale, explaining that the information was necessary in order for the Union to be certain that any contract it negotiated with Respondent included the appropriate parties to ensure enforceability. General Counsel argues that the Union's unease on this point was justified in light of Respondent's alleged "stonewalling," including Montalvo's repeated denials that he was the new owner together with his failure to providing the identities of appropriate contacts for the Union's bargaining requests.

When a union requests information which does not concern the terms and conditions within the bargaining unit, there is no presumption of relevancy. *Dexter Fastener Technologies, Inc.*, 321 NLRB 612, 613 fn. 2 (1996). In such an instance, the probable or potential relevance of the information must be shown. Id; *Shoppers Food Warehouse Corp*, 315 NLRB 258, 259 (1994). However, the burden to show relevance is "not exceptionally heavy." *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982). The question is "whether there is a probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Acme Industrial*, 385 U.S. at 437. I find that, under the circumstances here, where the Hotel had been purchased by a foreign company unknown to the Union, doing business in this country for the first time, the Union clearly had a valid reason for requesting such information, especially in light of the fact that the parties were bargaining for an initial contract. I further find that the Union's need for such information would be apparent to the Respondent. "[W]here the relevance … is obvious in the context of negotiations, the [employer] cannot resist disclosure simply because the union has failed to make a formal appearance of its theory of relevance." *Soule Glass & Glazing Co., v. NLRB*, 652 F.2d 1055, 1099, (1st Cir. 1981), quoted in *Barnard Engineering Co.*, 282 NLRB 617, 620 (1987). Moreover, the necessity for this information was additionally explicated at the hearing. [31]

In *Fremont Ford*, 289 NLRB 1290, 1293, 1297 (1988), the Board considered circumstances where, as here, certain information was requested from an employer found to be a "perfectly clear" successor under *Burns* and its progeny. In addition to requesting data concerning the identity and status of unit employees and a description of the wages, hours and other terms and conditions of employment of unit employees, the unions additionally sought information pertaining to the identity and status of the owners and officers of the company and certain key documents relating to the transfer of ownership and takeover by the respondent. The Board found that the employer was obliged to provide all the information sought: "The information requested by the Unions as it relates to unit employees is presumptively relevant to collective bargaining … The Respondent has not rebutted this presumption. Nor did the Respondent raise issues of relevance or lack of necessity in denying the Union's information request. For these reasons, we find that the Unions are entitled to the information requested." (internal citations omitted).

In the instant case, Hotel counsel Rothfeld wrote to the Union on August 12 that Respondent was gathering the requested information. No objection to the scope of the information request was raised at that time, or at any time thereafter. Thus, like the respondent in *Fremont Ford*, supra, the Respondent herein has raised no factual issue or cognizable argument regarding relevancy or the lack of necessity in failing to respond to the Union's information request.

After Rothfeld's initial communication, there was no response to the information request until March 2006, when Respondent first provided information relating to the names and addresses of employees, a wholly unexplained delay of some seven months, which, in my view, is tantamount to an abject refusal to provide the information for that period of time. [32] Moreover, there is no doubt that much of the information requested by the Union has never been provided to it.

Respondent argues, without any case support, that the matter is "moot" because it provided the information pursuant to the General Counsel's trial subpoena. Even assuming that the information provided pursuant to the subpoena is coextensive with what was requested by the Union, which has not been established, this defense is insufficient as a matter of fact and law. As an initial matter, the General Counsel is not the Union. Moreover, and more importantly, it would hardly be conducive to the process of collective bargaining if a union were to, as a regular matter, be obliged to seek recourse from the Board to obtain relevant and necessary information from an employer, which has such information within its direct control. See e.g. *The Kroger Co.*, 226 NLRB 512 (1976). In a similar vein, the Board has held that an employer may not refuse to furnish relevant information to a union on the grounds that the union has an alternative source or method of obtaining that information. *Hospitality Care*

Center, 307 NLRB 1131 (1992). Absent special circumstances, a union's right to information is not obviated by the fact that it may have access to the information through an independent course of investigation. *Illinois-American Water Co.*, 296 NLRB 715 (1989). Further, the availability of other sources of information does not relieve an employer of its bargaining obligation of disclosure, particularly where it has not shown that production would be unduly burdensome. *American Beef Packers*, 193 NLRB 1117 (1971). [33]

Accordingly, I find that by failing to furnish information to the Union which is necessary to the performance of its collective-bargaining responsibilities to unit employees, Respondent has violated Section 8(a)(1) and (5) of the Act, as alleged in the complaint. The fact that Respondent may have subsequently provided certain information to the Union, or produced it in response to the General Counsel's trial subpoena does not obviate the need for a remedial order herein. See e.g. *People Care, Inc.*, 327 NLRB 814 at fn. 2, 824 (1999).

The Alleged Unilateral Changes

As the Supreme Court has held:
Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

NLRB v. Burns Intern. Sec. Services Inc., supra at 294-295 (1972).

In *Spruce-Up Corp.*, 209 NLRB 194, 195 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), the Board stated that the "perfectly clear" caveat should:
be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing that they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer …has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Moreover, under *Spruce-Up* and its progeny, any potential announcement in terms and conditions of employment must be clearly set forth prior to or upon takeover. The successor employer is free to set new initial terms and conditions of employment up until the moment when it offers employment to the predecessor employer's employees, but not after. *Arden's*, 211 NLRB 510, 512 (1974). See also *Canteen Co.*, 317 NLRB 1052 (1995), enfd. 103 F.3d 1355 (7th Cir. 1977), where a successor employer made "perfectly clear" to the union representative that all employees would be hired, a wage reduction announced to employees the next day, prior to formal offers of employment being extended, was found to be an unlawful unilateral change.

Moreover, even if an employer announces some changes in terms and conditions of employment, it is not thereafter privileged to make other changes that are not specifically announced to employees before the takeover. *Cora Realty Co.*, 340 NLRB 366, 367 (2003) (post takeover termination of fringe benefits unlawful because successor failed to announce them prior to takeover); *Specialty Envelopes Co.*, 321 NLRB 828, 832 (1996) (although *Burns* successor lawfully announced certain changes prior to takeover, an unannounced change in attendance policy one month later was unlawful). This is the case, even where the change occurs shortly after the respondent assumes operations. See e.g. *Bronx Health Plan*, 326 NLRB 810, 813 (1998). Moreover, generalized or speculative statements that a successor employer may make future unspecified changes are not sufficient to put employees on notice. See e.g. *East Belden Corp.*, 239 NLRB 776, 793 (1987). Similarly, a discussion of possible changes in terms and conditions of employment will not excuse a subsequent unilateral change. See e.g. *C.M.E., Inc.*, 225 NLRB 514 (1976), where a successor employer held a meeting with the union representing the predecessor employer's employees. At that meeting, the union was informed that all the employees would be hired. In addition, possible contract changes were discussed, but no conclusions reached. The successor employer's subsequent unilateral changes were found to be unlawful. The Board

held that the bargaining obligation attached at the meeting where the union was informed that all the employees were to be rehired, and the successor employer was not privileged to subsequently implement changes absent bargaining. Thus, as the foregoing demonstrates, to the extent an employer's pre-takeover announcement contains ambiguities regarding the terms and conditions of employment offered to employees upon takeover, such ambiguities will be resolved against the employer. See e.g. *Fremont Ford*, supra at 1297.

Applying these principles to the facts of the instant case, I find that the "perfectly clear" caveat is applicable herein. Thus, as discussed above, the Respondent solicited employment applications from its employees beginning on June 29. Contrary to the assertions of Respondent, I find that there was no clear announcement at this time or by the time it assumed operations on July 1 that Respondent intended to establish new terms and conditions of employment, other than those which were set forth in the application packet distributed to employees.

I do not credit Montalvo's testimony that, in Respondent's initial meeting with its prospective employees, employees were told that insofar as their seniority was concerned, they were "starting from scratch." As an initial matter, I find the testimony of Ibarra and Joaquin, summarized above, warrants great weight. Respondent argues that these employees should not be credited as they are among the most senior employees, with a particular vested interest. To the contrary, I conclude that as current and long-term employees of Respondent, their testimony, which directly contradicts statements of their superiors, is likely to be particularly reliable because, on the whole, they are testifying adversely to their pecuniary interests. *Flexsteel Industries*, 316 NLRB 745 (1995), enfd mem. 83 F.3d 419 (5th Cir. 1996) (and cases cited therein). As noted above, these employees testified that there was no discussion of seniority at this meeting, no questions were asked and that employees were assured that things would remain the same. I found these witnesses were confident in their memory of what transpired and their testimony on these issues was clear and unequivocal. I note that their testimony is corroborated by Cabrera who no longer works for Respondent and, therefore, would have no apparent reason to be untruthful on these matters.

Moreover, I discredit Montalvo's version of events for several additional reasons. As an initial matter, I found Montalvo's testimony that employees were told that they were "starting from scratch" to have a hollow ring.[34] His testimony is also inherently implausible, For example, I doubt that either Calero or Rentero, whose native language is Spanish, would have used this sort of English-language idiomatic phrase.[35] Further, I find it more likely that if Respondent had intended to announce such a significant change at this time, there would have been a specific and unambiguous statement to such effect, and Respondent's principals would not have relied upon the use of slang to convey such a message to employees.

Additionally, as noted above, Ibarra testified that when she was interviewed for her position, she asked if her seniority would change. Her unrebutted testimony is that Montalvo replied that it "possibly" would, since he did not know her or her work. Had Respondent, in fact, announced the elimination of accrued seniority in an earlier meeting with employees, there would have been no reason either for Ibarra to have asked this question or for Montalvo to reply that it "possibly" would. I further note that the manual of employer policies distributed to employees along with their applications, which requires employee acknowledgement on each page, makes no mention of a seniority policy. I find it unlikely that an anticipated change in such an important term of employment would have been omitted from this manual.

Moreover, as Counsel for the General Counsel notes, both Montalvo and Coronel testified that the subject of seniority came up on several occasions in the months after the initial meeting with employees. The need for such continued discussions undermines Respondent's claim that the elimination of accrued seniority had been a clearly announced initial term of employment.

I do not credit Garcia's testimony about what was said at the June 29th meeting or in her subsequent discussion with her coworkers. In contrast to the testimony of Joaquin and Ibarra, Garcia is a recently-promoted manager whose pecuniary interests lie in corroborating the account of her employer. Moreover, her testimony regarding subsequent discussions with coworkers about their loss of seniority does not ring true. I do not believe that a loss of almost seven years of accrued seniority would have

been, as she stated, "not a big issue for her." Moreover, I note that her testimony in this regard was rebutted by Cabrera, who I consider to be a trustworthy witness with a clear and strong memory of events.

With regard to Coronel, Respondent relies upon her testimony that "[t]hey said that all of us were going to start as new. There were going to be small changes. And that all of us were going to start the same day, the July 1st, and we all were the same." While I do believe that Coronel attempted to testify truthfully, I find that her memory of the meeting on June 29 is quite poor. During her testimony, Coronel appeared to be confused about what occurred on that occasion. Apart from her demeanor, Coronel was unable to identify the individual who purportedly made such remarks. I also note that when pressed as to whether the specific issue of seniority was raised at this time, Coronel stated that it was not. Thus, her testimony on this issue is, at best, ambiguous. I find it far more likely that Coronel was conflating discussions Montalvo subsequently had with housekeeping employees regarding seniority, and any other discussions she may personally have had with him on this issue, with what was discussed during the June 29 meeting, about which she has limited recollection. [36]

Based upon the foregoing, given the totality of the circumstances, I conclude that the presentation to employees on June 29 was an introductory one at which time all employees were invited to apply for continued employment, and where Respondent announced its intention to hire as many of them as possible. I further find that there was no clear announcement, either prior to or simultaneous with Respondent's assumption of operations, that there would be a change in the manner by which seniority would be determined, or how scheduling would be influenced by any such change.

In the absence of an initial announcement of new terms and conditions of employment, a successor employer must maintain the status quo regardless of whether it adopts a predecessor's collective bargaining agreement. Where, as here, there is no such agreement, those terms and conditions are established by past practice. *Likra, Inc.*, 321 NLRB 134 (1996), citing *Blitz Maintenance*, 297 NLRB 1005, 1008 (1990) enfd. 919 F.2d 141 (6th Cir. 1990). A successor employer, like any other, violates Section 8(a)(5) by making unilateral changes to terms of employment which are mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962). As noted above, even in circumstances where an employer has set certain initial terms, employers still have an ongoing obligation to bargain with a union over any subsequent changes to terms and conditions of employment. *Cora Realty Co.*, supra; *Specialty Envelopes*, supra.

The Unilateral Elimination of Seniority

In *Kirby's Restaurant*, 295 NLRB 897, 901 (1989), the Board found an employer's failure to give credit for seniority accrued with the predecessor employer to be unlawful. In a similar vein, in *Hilton's Environmental, Inc.* 320 NLRB 437, 439 (1995), the Board found that a successor employer's unilateral imposition of a probationary period to be unlawful where there was no announcement until after the employer assumed operations and the new condition was imposed on employees without regard as to whether employees, many of whom had many years of service, had previously completed a probationary period with the predecessor employer. The imposition of this additional probationary period was, among other things, inconsistent with established past practice. In *Stephenson Haus*, 279 NLRB 998, 1003 (1986), the administrative law judge, affirmed by the Board, found that the respondent therein violated Section 8(a)(1) and(5) of the Act when it unilaterally discontinued crediting for seniority any service by an employee to the employing industry rendered prior to the date the respondent assumed operations, thereby creating a situation whereby almost every employee had identical seniority. [37] This is precisely what the Respondent has done here. Accordingly, I find that Respondent's unilateral change in seniority for unit employees violated Section 8(a)(1) and (5) of the Act, as alleged. [38]

The Alleged Unilateral Changes in the Housekeeping Department

The complaint alleges that in late September or early October 2005, Respondent violated the Act by increasing the work load and changing the duties of employees in the Housekeeping Department. In support of this contention, Counsel for the General Counsel argues that the Board has historically found that employers violate Section 8(a)(5) by unilaterally changing working

duties. It is also the case, however, that the Board has consistently held that not every unilateral change violates Section 8(a)(5); the change must be "material, substantial and … significant." *Peerless Food Products*, 236 NLRB 161 (1978); *Millard Processing Services*, 310 NLRB 421, 425 (1993).

I find that the evidence adduced on this issue by the General Counsel is not sufficient to establish that the alleged changes meet this standard. I credit the testimony of General Counsel's witnesses that in about October there was a change in the manner in which work was assigned to them, and I additionally credit their subjective assessments that this change has increased the volume of work that they do. I further find however, that the proof adduced by the General Counsel on this issue was too vague and lacking in specific detail to meet its burden to show that these changes were sufficiently substantial to meet the Board's criteria. As noted above, to the extent there is record evidence on this issue, it shows that employees previously received additional assignments on a daily and not, as General Counsel contends, periodic basis. The role that "housemen" or employees without specific room assignments play in the distribution of work is unclear. Moreover, although employees testified that it takes longer for them to complete their assigned tasks, there is insufficient specific evidence as to how much time is actually involved: the one fact which is known is that the official work hours of employees in the Housekeeping Department have not changed. [39] To adopt the General Counsel's characterization of the alleged unilateral changes herein would require me to make certain assumptions which the record as a whole does not support.

In *Kal-Equip Co.*, 237 NLRB 1234 (1978), relied upon by the General Counsel, the Board found that the respondent therein violated the Act by unilaterally changing production standards. This case differs from the instant one in various respects. As an initial evidentiary matter, the nature of the alleged unilateral change was specific and fully adduced in the record. Moreover, there was evidence that employees were disciplined for failing to meet the production quotas established by the alleged unilateral changes. [40] One of the cases relied upon the respondent therein, and discussed by the administrative law judge, was *The Little Rock Downtowner, Inc.* 148 NLRB 717, 719 (1964). There, the Board found that the employer did not violate the Act when it unilaterally instructed its housekeeping employees to wash motel room windows everyday even though the employees had not, for some time, maintained that standard. The Board held that, even assuming that the new job instructions constituted a unilateral revival of a previously abandoned rule, it would not find that a violation of the Act had occurred. In particular, the Board found that "[t]his type of work order does not exceed the compass of the job duties the affected employees were hired to perform and falls within the normal area of detailed day-to-day operating decisions relating to the manner in which work is to be performed." The rationale of this case is distinguishable from that found in *Alwin Mfg. Co.*, 314 NLRB 564, 568 (1994), also relied upon by the General Counsel, where the Board found that the employer's unilateral imposition of minimum production standards, [41] enforceable by disciplinary action, to violate the Act where the "minimum production standards were not merely a refinement or more vigorous enforcement of existing standards but represented a radical departure from past practice."

In the instant case, the facts, at least insofar as they can be gleaned from the record, lend themselves more readily to the analytical framework discussed in *The Little Rock Downtowner*. I cannot conclude that the evidence establishes that the unilateral changes imposed by Respondent were more than "merely a refinement or more vigorous enforcement" of prior standards or that they were outside "the compass of the job duties the affected employees were hired to perform." [42] Based upon the foregoing, I find that the General Counsel has failed to demonstrate that the unilateral changes made by Respondent are "material, substantial and … significant," or that they can be found to constitute a violation of Section 8(a)(5) of the Act. Accordingly, I shall recommend that this allegation of the complaint be dismissed.

The Reduction in Personal Days

The complaint alleges that Respondent unilaterally reduced the number of personal days to which employees are entitled from three to two. Respondent denies that it violated the Act in this fashion, and further argues that no employee was ever affected by such a change. The evidence establishes that under the predecessor employer, employees were entitled to three paid personal days per year. Some time after Respondent assumed operations, Housekeeping Department Manager Mroziewska told employees that they would be granted only two such days.

The number of paid personal days granted to employees, like other paid time off from work to which employees are entitled, is a mandatory subject of bargaining. See e.g. *Pine Brook Care Center, Inc.*, 322 NLRB 740, 748 (1996) (and cases cited therein). Montalvo testified that no employee has ever been denied a third personal day; however, even if this is true, the testimony of the affected employees, that they were specifically advised of the change, is unrebutted. [43] Moreover, there is no evidence that Respondent has officially rescinded its announcement of the change. Respondent additionally relies upon Montalvo's testimony that he learned of the past practice of awarding employees three paid personal days at some point in time after Respondent assumed the operation of the Hotel. As noted above, I have generally discredited Montalvo's testimony in significant regard. His testimony on this issue, adduced largely through the use of leading questions, is suspect as well. I note that Azevedo remained employed at the Hotel for two months to assist Montalvo with the transition, and find it unlikely that the predecessor's time off policies would not have been communicated to him. Moreover, Mroziewska was clearly cognizant of the predecessor's employment practices, as she announced the change to employees. In *Pepsi-Cola Distributing Co., of Knoxville, Tenn.*, 241 NLRB 869, 870 (1979), the Board considered a situation where the successor had no knowledge of the predecessor's practice of paying a year end bonus to salesmen at the time in promulgated initial terms and conditions of employment, but learned of it at a later time. The Board found that the unilateral discontinuation of the bonus was a violation of the Act, noting that the successor should have bargained with the union prior to discontinuing the predecessor's practice.

Based upon the foregoing, I find that by reducing the number of paid personal days granted to employees, Respondent has violated Section 8(a)(1) and (5) of the Act, as alleged.

Conclusions of Law

1. The Respondent, Hotel Vincci, LLC d/b/a The Avalon, is an employer engaged in commerce within the meaning of section 2(6) and (7) of the Act.

2. The Union, Local 758, Hotel & Allied Services Union, SEIU, is a labor organization within the meaning of Section 2(5) of the Act

3. At all material times, including on and after July 1, 2005, the Union has been the designated exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit within the meaning of Section 9(a) of the Act:
All full-time and regular part-time service and maintenance employees including front desk employees, guest service managers, night auditors, bell staff, maintenance workers, housekeeping workers, housemen, laundry workers, minibar attendants and room attendants employed by the Employer at its facility located at 16 East 32 nd Street, New York, New York, excluding all other employees, including office clerical employees, managerial employees and guards, professional employees and supervisors as defined by the Act.

4. By failing and refusing to meet and bargain with the Union from July 1, 2005 through mid-December 2005, and by failing and refusing to promptly schedule bargaining meetings, Respondent violated Section 8(a)(1) and (5) of the Act.

5. By failing and refusing to furnish the Union with the information requested by it in its letters of July 19 and July 29, 2005, the Respondent violated Section 8(a)(1) and (5) of the Act.

6. By decreasing employees' personal days from three to two per year, without notice to or consultation with the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

7. By eliminating the accrued seniority of employees which had been used for determining priority for time off and scheduling, without notice to or consultation with the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 8(a)(1) and (5) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent be ordered to meet and bargain in good faith with the Union as the exclusive collective bargaining representative of its employees in the unit, and to embody any understanding reached in a signed agreement. I shall further recommend that Respondent be ordered to furnish the Union with all the information requested by the Union in its letters of July 19 and 29, 2005.[44] I shall additionally recommend that Respondent be ordered to cease and desist from making unilateral changes terms and conditions of employees and rescind those changes implemented following its July 1, 2005 assumption of operations, in particular the reduction in the number of personal days to which employees are entitled and the elimination of employees' accrued seniority, until such time as Respondent negotiates in good faith with the Union to agreement, or to impasse. I shall further recommend that Respondent be ordered to reinstate the method that was in place prior to July 1, 2005 for determining priority for time off and scheduling for employees, and that Respondent be ordered to make employees whole for any loss of pay or other benefits they may have suffered as a result of the Respondent's unilateral changes in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970) enfd. 444 F 2d. 502 (6th Cir. 1971) with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[45]

ORDER

The Respondent, Hotel Vincci, LLC, d/b/a The Avalon, its officers, agents, successors, and assigns, shall
1. Cease and desist from
(a) Failing and refusing to meet and bargain in good faith with Local 758, Hotel & Allied Services Union, SEIU, in the following appropriate unit:
All full-time and regular part-time service and maintenance employees including front desk employees, guest service managers, night auditors, bell staff, maintenance workers, housekeeping workers, housemen, laundry workers, minibar attendants and room attendants employed by the Employer at its facility located at 16 East 32nd Street, New York, New York, excluding all other employees, including office clerical employees, managerial employees and guards, professional employees and supervisors as defined by the Act.

(b) Failing and refusing to provide the Union with information necessary and relevant to the performance of its responsibilities as the exclusive collective-bargaining representative of the employees in the above-described unit and, in particular, such information as was requested in the Union's letters of July 19 and 29, 2005.

(c) Reducing the number of personal days to which employees are entitled, eliminating employees' accrued seniority or making any other changes to the terms and conditions of employment of employees in the unit, without prior notice to and consultation with the Union.

(d) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain collectively and in good faith concerning wages, hours and other terms and conditions of employment with the Union as the exclusive representative of employees in the above-described unit, including promptly scheduling bargaining meetings, and embody any understanding reached in a signed agreement.

(b) Provide the Union, in a timely fashion, with the information requested by it in its letters of July 19 and 29, 2005.

(c) Upon request, rescind the unilateral changes in terms and conditions of unit employees by restoring the number of personal days to which employees are entitled, restoring employees' accrued seniority and reinstating the method that was in place prior to July 1, 2005 for determining priority for time off and scheduling for employees until such time as Respondent negotiates in good faith with the Union to agreement, or to impasse.

(d) Make employees whole for any loss of pay or other benefits, with interest, they may have suffered as a result of the Respondent's unilateral changes relating to their personal days or accrued seniority.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in New York, New York copies of the attached notice marked "Appendix"[46] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees] are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2005.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 6, 2006

Mindy E. Landow
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

***1** The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to bargain collectively in good faith with Local 758, Hotel & Allied Services Union, SEIU (the Union) concerning wages, hours and other terms and conditions of employment of employees in the following unit:
All full-time and regular part-time service and maintenance employees including front desk employees, guest service managers, night auditors, bell staff, maintenance workers, housekeeping workers, housemen, laundry workers, minibar attendants and room attendants employed by the Employer at its facility located at 16 East 32nd Street, New York, New York, excluding all other employees, including office clerical employees, managerial employees and guards, professional employees and supervisors as defined by the Act.

WE WILL NOT fail and refuse to furnish to the Union information requested in its letters of July 19 and 29, 2005.

WE WILL NOT make unilateral changes to the terms and conditions of employment of our employees represented by the Union including reducing the number of personal days to which they are entitled or eliminating their accrued seniority and the priority such accrued seniority is given in scheduling time off for employees.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit described above.

WE WILL furnish to the Union in a timely fashion the information requested by it in its letters of July 19 and 29, 2005.

WE WILL, on request, rescind the unilateral changes to the terms and conditions of employment of our employees in the unit set forth above by restoring the number of personal days to which they are entitled, restoring their accrued seniority and reinstating the method that was in place prior to July 1, 2005 for determining priority for time off and scheduling for our employees, until such time we negotiate in good faith with the Union to agreement, or to impasse.

VINCCI USA, LLC d/b/a THE AVALON

(Employer)

Dated _____ By .....

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614

New York, New York 10278-0104

Hours: 8:45 a.m. to 5:15 p.m.

212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

***2** THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.

Footnotes

1 All dates hereafter are in 2005 unless otherwise specified.

2 This Order removed Stanford as a respondent in this case.

3 At hearing, Counsel for the General Counsel moved to amend the complaint to withdraw allegations pertaining to an alleged changes in employee sick leave benefits and compensation in holiday pay.

4 Respondent's answer avers that this allegation of the complaint calls for a legal conclusion to which no response is required.

5 Dunning's initial communication with the Union as counsel for Respondent occurred in late-October.

6 Mr. Rentero's name is frequently transcribed as “Ventero” or “Venterro” and, at times, witnesses referred to him as “Renterria.” Montalvo testified that there is no individual by the name of “Renterria” working for the Respondent.

7 Rentero did not testify herein.

8 Although Azevedo's name is transcribed in the record as “Acevedo,” Respondent's records indicate that the correct spelling is Azevedo.

9 Witnesses were not completely certain about the date of this meeting, but the record demonstrates that only one was held. Employees Ruth Ibarra and Trifinia Joaquin testified that they completed employment applications on the same day as the meeting, and their applications are dated June 29. Carmen Garcia testified that the meeting was held on June 30.

10 Garcia was promoted in September 2005.

11 Garcia later testified that she responded to this comment with the reply, “so what.”

12 On sur-rebuttal Garcia testified that this conversation did, in fact, occur and was related on ongoing dispute between the two due to the settlement of an unfair labor practice charge regarding Cabrera's seniority. In fact, the settlement in question, which pertained to a number of issues not relevant here, remedied among other things, the prior employer's unlawful changes in work schedules of employees, but did not specifically address the issue of seniority.

13 Cabrera's testimony indicates that there may have been some excited chatter among employees, particularly when slides of the Vincci properties located abroad were shown, including rhetorical questions about whether employees would be able to go and work at these facilities.

14 Coronel was also unable to recall when this meeting took place.

15 On cross-examination Coronel testified that on Tuesday, two days prior to her testimony, she was called to a meeting with Montalvo and Castillo to discuss her testimony. She later testified that she was told to tell the truth during her testimony.

16 These include admonitions that an employee will come to work "in good shape," shaved and clean and with a clean and tidy uniform. Mustaches, beards, strong perfumes and big jewelry are prohibited. In addition employees are told that they must use the employee entrance, designated bathrooms and refrain from using the guest elevator except when necessary because of job duties.

17 Montalvo testified that he complied some of the information sought and forwarded it to his attorney, David Rothfeld. Respondent does not contend, however, that the information was forwarded to the Union at this time.

18 In addition to demanding negotiations, Diaz also requested that Respondent reinstate employees' seniority and rehire certain employees who had been discharged when Respondent assumed operations.

19 This change, alleged as an unfair labor practice herein, is discussed in further detail below.

20 On December 29, Hirozawa sent Dunning an e-mail to confirm the January 3rd meeting. In ensuing correspondence, Dunning replied that finalizing a proposal by January 2nd would be difficult given that business was not conducted in Spain during that week, and said he would call to discuss the matter. Hirozawa offered to meet later in the day, and Dunning replied that "Tuesday might be too ambitious, after all."

21 The parties had earlier agreed to alternate meeting locations. Dunning asked that the second meeting take place, out of order, in his office due to his client's unfamiliarity with American labor negotiations and his possible discomfort with the situation. Hirozawa agreed as long as it was understood that the parties would alternate in the future.

22 Hirozawa's unrebutted testimony is that Respondent never inquired as to why this information was required, and that the information relating to first item (relating to the names of those individuals possessing an ownership interest in the Hotel) is necessary to determine who the appropriate parties to the contract would be to render it enforceable.

23 According to Ibarra, Mroziewska was the supervisor of the department until sometime in November 2005, and Keilszewska acted as supervisor from November until January 2006.

24 As Martinez testified: "Now we have to do the 10 rooms plus cleaning the edges of the rooms, the pictures, the mirrors, candelabra, the armoire at the top and on the inside, remove the tray from the restaurant, clean the edges of the hallway outside, vacuum the times that are needed, clean the candle holders on the hallway, the pictures and the mirrors."

25 Mroziewska is usually referred to in the record as "Bosena." It appears from the record that her first name is spelled "Bozena." Mroziewska did not testify.

26 I note that the charge alleging this unilateral change was filed in November 2005.

27 I note that Diaz's testimony regarding the various discussions he had with Montalvo during which he requested bargaining was not rebutted.

28 This is one of several instances in which Montero's credibility is seriously called into question. The outlandish nature of this assertion casts doubt on the veracity of his testimony generally.

29 The General Counsel appears to concede that bargaining commenced in mid-December.

30 The evidence fails to establish that Respondent has violated the Act specifically by failing to offer counterproposals, as alleged in the complaint.

31 As the General Counsel notes, in the context of information requests concerning possible single employer or alter ego relationships, Chairman Battista and Member Shaumber have recently expressed unease with the rationale of *Corson & Gruman*, supra, indicating that they preferred a view articulated by the Third Circuit that unions must apprise an employer of facts tending to support the reasons for the request for the non-presumptively appropriate information. *See Hertz Corp. v. NLRB*, 105 F.3d 868, 874 (3rd Cir. 1987). Nevertheless, the Board has also held that where the facts supporting the reason for the information request were presented at trial, and the employer still refused to accede to the request, a violation would be found. *See Contract Flooring Systems*, 344 NLRB NO. 117 (2005); *Pulaski Construction Co.*, 345 NLRB No. 66 (2005). The instant case does not involve the Union's suspicion of an alleged single employer or alter ego relationship in the context of an ongoing contractual dispute, but rather a request for information in anticipation of bargaining for an initial contract, regarding the identity of the party to be bound, which is a situation not addressed by the cases cited above. In any event, even if the Third Circuit's analytical framework was applied in the instant case, I conclude, as discussed above, that Hirozawa's explanation at trial for the reason the information was sought is sufficient to meet the Union's burden in this regard.

32 I note that the complaint, which was issued before the payroll data was supplied, does not specifically allege a delay in providing information.

33 At the hearing Montalvo, in apparent discomfort with Counsel for the General Counsel's pointed inquiry about whether specific items of information had ever been provided to the Union, testified that certain items had been given to his attorney, but not transmitted. Of course, even if this were true, it would not relieve Respondent of liability herein. I find, moreover, that Montalvo's testimony in this regard was clearly extemporized, and I do not credit it. On rebuttal, Counsel for the General Counsel called Rothfeld to rebut Montalvo's testimony about whether he had ever given such information over, primarily as general impeachment testimony. I allowed

certain testimony and documentary evidence as an offer of proof, subject to consideration of Respondent's objection to such evidence on the grounds of attorney-client privilege. Upon consideration of the evidence on whole, I find that there is a sufficient basis to reach a determination regarding Montalvo's credibility regarding those specific issues about which there is controversy without considering or relying upon Rothfeld's testimony or the accompanying documentary evidence.

34 As noted above, Montalvo testified to his "understanding" of what this phrase meant, but offered no other specific testimony about what was actually told to employees.

35 I note that the record establishes that Rentero is admittedly uncomfortable conversing in English.

36 I further note that Coronel did not corroborate Montalvo's apparent attempt to explain that his subsequent announcement regarding seniority and scheduling stemmed from a complaint she brought to him about the inequities of how days off had been assigned. Rather, Coronel testified to the contrary: that she asked Montalvo why employees could not have regular days off.

37 As the administrative law judge noted, "when Respondent went about changing … wages and working conditions, it was not unilaterally altering the wages and working conditions of its predecessor. It was altering its own wages and conditions, all of which had been in effect for various periods of time subsequent to the takeover….Respondent found itself in the more conventional situation of a unionized company that wanted to make changes in existing wages and conditions. In order to make such changes, it was first under an obligation to notify the representative of its employees of its desires and to give it an opportunity to bargain collectively regarding requested changes." 279 NLRB at 1003.

38 The complaint additionally alleges that employees' accrued seniority was used to determine priority for time off and scheduling, including the scheduling of employees' work shifts. Respondent does not dispute this to be the case, but argues that any changes it subsequently implemented stem from its lawful announcement that pre-acquisition seniority was to be eliminated, a contention I have rejected. I find, therefore, that there was a change in the manner in which employees were scheduled and assigned days off, and that this change flows from Respondent's unlawful elimination of accrued seniority. I further find a return to the status quo ante in terms of how employee time off is scheduled is warranted as part of the remedy herein. The record fails to establish any other consequence of the unilateral change in employee seniority.

39 Counsel for the General Counsel argues that maid's reports from before and after the alleged change would provide documentary evidence on this issue and notes that although such reports were subpoenaed none prior to December 2005 were produced. At the hearing, counsel for Respondent represented that reports for earlier periods could not be located, and I accept that representation, which I note is unchallenged by the General Counsel. The inability of the Respondent to provide these documents pursuant to subpoena does not relieve the General Counsel of its burden of proof and I find it significant that Counsel for the General Counsel did not attempt to adduce more specific testimony from its witnesses regarding these issues.

40 Counsel for the General Counsel also cites *King Scoopers, Inc.*, 340 NLRB 628 (2003) for the general proposition that a unilateral change in work duties is violative of the Act. In that case the Board found that the respondent violated the Act by failing to bargain with the union before implementing the use of a new scanner technology by employees in the respondent's pharmacies. The Board found the implementation of this policy unlawful on the specific grounds that it constituted a work rule which could be grounds for discipline, and thus was a mandatory subject of bargaining, where it was "undisputed" that employees would be subject to discipline for failing to follow the policy. In reaching its determination, the Board made specific note of the fact that the respondent's decision to install the scanner technology, was not challenged by the General Counsel in that case. Id. at 629.

41 In that case, there was specific evidence that the employer informed four classifications of employees what the minimum production requirements per hour for their functions were, that they would have one day to become acclimated to them and if they did not meet them beginning the following day, they would be subject to disciplinary action.

42 See also *Flambeau Airmold Corp.*, 334 NLRB 165, 172 (2001), where the positions of several employees were eliminated with other employees required to "pick up" their responsibilities. The Board affirmed the administrative law judge's finding that no violation had occurred with regard to those employees who had "pick[ed] up" these job responsibilities because there was "no evidence establishing that this was a material change." In reaching this decision, the administrative law judge cited a lack of specific evidence regarding the difficulty of the newly-assigned tasks or the amount of time they took to perform.

43 See *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155, 155-156 (1998), cited by Counsel for the General Counsel, where the Board found that an announced curtailment of breaks, without actual curtailment, violated Section 8(a)(1) and (5), because an announced change sends a message to employees that an employer claims the sole right to set a term and condition of employment.

44 I note that certain information was provided to the Union in March 2006. However, given the passage of time and employee turnover, that information may no longer be accurate and complete.

45 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

46 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

2006 WL 1895044 (N.L.R.B. Div. of Judges)

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